Petition

81-1045

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In the Supreme Court of the United States

October Term, 1981

GEORGE FENNER and CATHERINE FENNER,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURT PROPERLY CONCLUDED THAT A DEFENDANT/AUTOMOBILE MANUFACTURER WAS ENTITLED TO JUDGMENT N.O.V. IN A PRODUCTS LIABILITY ACTION ON THE GROUND THAT THE JURY'S FINDING OF "PROXIMATE CAUSE" WAS "SPECULATIVE"—WHEN "PROXIMATE CAUSE" COULD NOT BE PROVEN BY DIRECT EVIDENCE BECAUSE OF THE DESTRUCTION OF THE AUTOMOBILE, BUT WAS PROVEN TO THE SATISFACTION OF THE JURY CIRCUMSTANTIALLY BY:

(1) DIRECT EVIDENCE OF A DEFECT IN THE STEERING SYSTEM WHICH WOULD CAUSE IT TO LOCK IN NORMAL USE;

(2) DIRECT EVIDENCE THAT THE STEERING SYSTEM LOCKED IN NORMAL USE, CAUSING THE PLAINTIFFS' ACCIDENT;

(3) THE ABSENCE OF ANY EXPLANATION BY THE DEFENDANT AS TO HOW THE PROVEN MALFUNCTION COULD HAVE BEEN CAUSED BY ANYTHING OTHER THAN THE PROVEN DEFECT; AND

(4) DIRECT EVIDENCE NEGATING ALL ALTERNATIVE CAUSES OF THE ACCIDENT SUGGESTED

II

BY THE REMAINING CIRCUMSTANTIAL EVIDENCE.[1]

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1. The trial court alternatively concluded that the defendant was entitled to a new trial for precisely the same reason; because of its affirmance of the defendant's judgment, the Court of Appeals did not reach that alternative issue. Since that issue is subsumed for all practical purposes in the question stated above, we have not stated it separately. If certiorari is granted, however, the propriety of the alternative new trial order will also be presented for review. Fortunately, because of the similarity of the two issues the additional issue will require little additional argument on our part or effort on the part of the Court.

Alternatively, the Court could dispose only of the question stated above, and if the question is resolved in our favor, the case could be remanded to the Fifth Circuit for initial consideration of the second issue.

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The petitioners, George Fenner and Catherine Fenner, respectfully pray that a writ of certiorari issue to review the opinions and judgment of the United States Court of Appeals for the "former Fifth Circuit" entered in this proceeding on June 8, 1981, and June 16, 1981, respectively.[2]

OPINIONS BELOW

The decision of the Court of Appeals, which consists of a majority opinion and a dissenting opinion, is reported at 657 F.2d 647, and appears in the appendix hereto at page A1. The memorandum order of the District Court was not reported; it appears in the appendix at page A12.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1981. (The judgment appears in the appendix at page A19.) A timely petition for rehearing and suggestion for rehearing en banc was thereafter denied on September 9, 1981. (The order denying rehearing appears in the appendix at page A20.) This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

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2. The "former Fifth Circuit" split into the "new Fifth Circuit" and the "Eleventh Circuit" on October 1, 1981. *See* 28 U.S.C. §41, as amended by P.L. 96-452 (October 19, 1980). According to that Act, the "former Fifth Circuit" remains in existence until July 1, 1984, to entertain "further proceedings" in this and similar causes, and the writ of certiorari should therefore issue to the "former Fifth Circuit".

by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

George and Catherine Fenner were badly maimed on the morning of December 15, 1972, when their new 1972 Oldsmobile left the paved surface of the Florida Turnpike at 60-65 m.p.h., traveled down the median for a short distance, and struck a concrete column supporting an overpass. According to Mr. Fenner, who was driving the automobile, the vehicle became uncontrollable when its steering system locked during an attempted lane change. Mr. and Mrs. Fenner filed suit against the manufacturer of the automobile, General Motors Corporation, in the Circuit Court for the Fourth Judicial Circuit of Florida (R. 4). The cause was removed by the defendant to the United States District Court for the Middle District of Florida, on the ground of diversity of citizenship, pursuant to 28 U.S.C. §1332(a)(1) (R. 1). The amended complaint sought to hold the defendant liable for the plaintiffs' injuries on three theories: negligent design, breach of implied warranty, and strict liability (R. 340). The defendant answered, denying liability (R. 349, 398).

The action was thereafter tried to a jury for seven days. The evidence at trial revealed that all of General Motors' 1971 and 1972 "full-size" automobiles were manufactured with an inherent design defect, consisting of a narrow funnel-shaped space between a frame crossmember and the "steering coupling" in which stones or other foreign objects could become lodged, causing the steering system

to "lock" in normal use.[3] General Motors did not dispute the existence of this defect in the Fenners' automobile (either at trial or on appeal). Although the Fenners were able to prove the existence of the defect by direct evidence, they were unable to prove by direct evidence that a foreign object (lodged in the defectively designed area) caused the accident—because they were hospitalized immediately after the accident and were unable to inspect the vehicle's steering system themselves; and because the vehicle was towed away by the authorities and junked at an unknown location, making it unavailable for a later "autopsy" by an expert (T. I 63, 194; III 156; IV 22). The Fenners were therefore required, of necessity, to prove the element of "proximate causation" (i.e., that the defect caused their injuries) by circumstantial evidence. They attempted to do so in a manner authorized by what used to be (prior to the instant case) a long line of authority (in both Florida and the federal courts) allowing proof of the requisite elements of a products liability action by introduction of (1) direct evidence that the product malfunctioned in normal use, and/or (2) direct evidence negating possible alternative causes of the accident other than a defect in the product.

To prove their case the plaintiffs first proved the existence of the defect in the steering system by direct evidence, as noted above. Next, the plaintiffs produced direct evidence that their automobile had been driven over a road under construction, covered with rocks, for several

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3. According to the record, this defect (which has become known in the trade as the "stone interference" problem) has been the subject of numerous personal injury lawsuits similar to the instant case (T. IV 166-67). There are at least two additional federal appellate decisions concerning the problem; in both of those cases, unlike the instant case, jury verdicts for the injured plaintiffs withstood the defendant's challenges that they were too speculative to be approved. *Leathers v. General Motors Corp.*, 546 F.2d 1083 (4th Cir. 1976); *Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980).

days prior to and on the day of the accident (T. I 33-35, 38). The evidence also showed that this road condition was most conducive to inducing the "stone interference" problem (PX. 15, 16, 24). Mr. Fenner then provided direct evidence that the steering system in his new automobile locked in normal use within a few miles after leaving the stone-covered road:

> A. . . . I went a short distance in the left lane and I tried to get back into the right lane as soon as I was ready to pass that vehicle. I turned—I attempted to turn the steering wheel into the right lane and that is when my steering locked on me and I can tell you now it was a terrifying experience.
>
> Q. What do you mean that it locked?
>
> A. It locked so I could not do anything with it. I could not turn it left nor right and the vehicle was going over into a left direction. . . .
>
> . . . .
>
> A. . . . I attempted to, as I said, turn to the right to get back into the right lane. The steering locked on me at that point. The car kept going over into a left direction and right in front of me that I could see there was an overpass in front of us and in the center of the overpass there was a column holding up the overpass and in front of that was a guardrail and I could see right then in the few instants or seconds that were available at that time that the car was going in there and was going to strike this guardrail.

(T. I 43-44; see in addition, T. I 104-105, 117-19).[4]

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4. Because of her injuries, Mrs. Fenner had no memory of the accident and was therefore unable to shed any light on what occurred (T. I 153, 161, 168).

The plaintiffs then attempted to establish that there was no other explanation for the proven steering system malfunction, other than the proven defect. One of the defendant's experts was asked by plaintiffs' counsel if he knew of any explanation, other than a "stone interference" problem, which could explain a driver's inability to steer a 1972 Oldsmobile 88 in the manner described by Mr. Fenner; the question was asked three times, but the trial court would not allow the question to be answered (T. IV 189-92).[5] On redirect examination, this expert (who had sat through the entire trial as the defendant's representative) testified that, based upon what he had heard at trial, he had no opinion as to the cause of the accident (T. IV 194). He opined, however, that three causes were possible: (1) Mr. Fenner may have blacked out; (2) Mr. Fenner may

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5. The question was a perfectly legitimate one, because if General Motors had admitted that the *only* possible explanation for a steering lockup in the Fenners' automobile was a "stone interference" problem, it would have conceded the question of "proximate causation" in the case. We suspect that General Motors knew that the answer to the question was devastating to its case, and that it vigorously objected to the question as a result. The trial court's error did not hamstring the plaintiffs completely, however, because the proof came in in a negative fashion—the defendant never produced any proof that the steering malfunction to which Mr. Fenner testified could be caused by anything other than a "stone interference" problem.

In addition, since the jury could reasonably believe that General Motors was in the best position to explain how the steering system in its automobiles could malfunction, it could reasonably conclude from the failure of General Motors to produce any alternative explanation for the malfunction (once it accepted Mr. Fenner's testimony of the malfunction as true) that the only problem which could produce the malfunction described by Mr. Fenner was the "stone interference" problem. *See Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge*, 422 F.2d 684, 694 (5th Cir.), *cert. denied*, 400 U.S. 832 (1970) (failure of defendant to offer evidence within its ability to produce which would explain or rebut a case made by the plaintiff raises presumption that the evidence would be unfavorable to its position); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145, 155 (2nd Cir. 1976) (same).

have been inattentive or careless; or (3) Mr. Fenner may have reacted poorly to a flat tire (T. IV 194-95). These three possible alternative causes were arguably suggested by the circumstantial evidence in the case, if the jury chose to believe General Motors' version of the facts.[6]

To eliminate these possible alternative causes of the accident suggested by the circumstantial evidence, the plaintiffs provided direct evidence negating each one of them. First, of course, Mr. Fenner's direct testimony that his steering system locked, standing by itself, negatives all of the possible alternative causes of the accident proposed by General Motors. In addition, each possible alternative cause suggested by the circumstantial evidence was more directly negated by the direct testimony of Mr.

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6. These three alternative causes of the accident were the only ones proposed by General Motors at trial. For the first time on appeal, however, General Motors asserted that the accident could also have been caused by front-end misalignment or loss of power steering system fluid. Since these suggested alternative possible causes were never proposed to the jury, we think they are irrelevant here, but we mention them nevertheless in anticipation that General Motors will continue to confuse the issue here with reference to them in its response.

Suffice it to say that there is no evidence in the record that either of these two suggested possible causes of the accident can cause a steering system to *lock* irrevocably, and that it is a matter of common knowledge that they cannot. Millions of automobiles in this country are driven with their front ends out of alignment. Tires are worn as a result, but the steering systems of those automobiles do not lock at 60 m.p.h. during minor lane changes. Similarly, automobiles were manufactured without power steering for decades, and an automobile *can* be steered without the hydraulic assistance of a boosted power steering system. The effort required to steer an automobile without the assistance of power boost is greater, of course, but the steering system does not *lock* when the power assist drops off the line.

More importantly, we think the jury was empowered to find that an automobile which loses its steering, merely because its front end has become misaligned or its power steering fluid has been lost, is a defectively designed automobile—so the suggested existence of these additional possible causes of the accident cannot possibly justify the entry of a judgment n.o.v. in favor of the defendant.

Fenner. To negate the circumstantial evidence that the accident was caused by a driver blackout, Mr. Fenner testified:

> Q. And anytime between the time you woke up on December 15th prior to the accident which occurred on December 15th did you black out?
>
> A. No, I did not.

(T. I 80; see in addition, T. I 115). To negate the circumstantial evidence that the accident was caused by carelessness, Mr. Fenner testified:

> A. . . . I knew at that time that I had not committed a careless driving act.
>
> . . . .
>
> Q. But you were certain that you hadn't driven carelessly; is that right?
>
> A. That is correct. . . .

(T. I 147; see in addition, T. I 142). To negate the circumstantial evidence that the accident was caused by a tire failure, Mr. Fenner testified:

> Q. Mr. Fenner, as far as you are aware did your tire blow out on December 15th?
>
> A. No, sir.
>
> Q. As far as you are aware did it go flat prior to it going off the road into the median?
>
> A. No, sir.

(T. I 142).[7]

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7. The circumstantial case for a tire failure was also negated by the testimony of an eyewitness to the accident, the state trooper who investigated the accident, and the plaintiffs' expert (*see* T. I 135; T. II 161-62; T. III 154-56, 160-61; T. IV 13-16, 19-20, 23, 26-28).

On this state of the evidence, the question presented to the jury on the issue of "proximate causation" was a simple one. It could find, as it ultimately did, on the *direct* evidence that the steering system in the plaintiffs' automobile was defective, and that the steering system malfunctioned and caused the accident. The *only* inference which was required was that the proven steering system defect was a cause of the proven steering system malfunction—and therefore a "proximate cause" of the plaintiffs' injuries. In the absence of a single explanation by the defendant for the proven steering system malfunction, the inference ultimately drawn by the jury that the defect caused the malfunction was, in our estimation, the only reasonable inference which the jury could draw.[8]

This relatively simple circumstantial case on the element of causation was complicated at trial, however, by

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8. It is worth noting here that the majority below was terribly confused in focusing its attention on the other inferences available as causes of the *accident*, and in its consequent insistence that those other inferences counterbalanced the inference that the defect caused the accident. We continue to insist that once the jury chose to believe Mr. Fenner's direct testimony that a steering system malfunction caused the accident, the other possible causes of the *accident* became irrelevant—and the only relevant question was whether the jury could properly infer that the defect caused the *malfunction*. There were *no* alternative possible causes of the *malfunction* shown by the evidence, and the inference drawn by the jury was therefore the *only* inference available to it on the evidence.

We should also note that the majority dissected this single reasonable inference into several intermediate inferences, in an apparent effort to demonstrate that the inference of causation was tenuous. In so doing, it ignored its own recent eloquent demonstration of the fallacy of such an exercise:

> Consistently enforced . . ., the rule [against constructing inferences upon inferences] would make proof by circumstantial evidence virtually impossible, since most generally accepted inferences may be dissected into intermediate inferences. Like Achilles of Zeno's paradox, we might never reach a conclusion.

Cora Pub, Inc. v. Continental Casualty Co., 619 F.2d 482, 485 (5th Cir. 1980).

the testimony of the defendant's experts, both of whom opined that the "stone interference" problem manifests itself typically during *left* turns, not during a right turn after a minor lane change involving a preceding left turn —and that it was improbable that the defect in the steering system caused the accident described by Mr. Fenner as a result (T. III 62, 69; T. IV 116, 135-36).[9] Each of the experts admitted, however, that it was "possible" that the defect could have caused the accident described by Mr. Fenner (T. III 67-68, 99; T. IV 168-69, 180).[10]

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9. Curiously, the accident described in *Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980), was caused by a "stone interference" problem which caused a steering system lockup during a right turn after a minor lane change involving a preceding left turn. Put another way, the accident described in *Lowe* was identical to the accident described by Mr. Fenner. The plaintiffs' verdicts on liability in *Lowe* were approved, notwithstanding the "improbability" of the defect causing the accident. The Court in the instant case distinguished *Lowe* on the disingenuous but telling ground that the plaintiffs produced the stone which killed their decedents in *Lowe*, and the Fenners did not. The two decisions, in our estimation, stand for the consolidated (and erroneous) proposition that a plaintiff in a products liability action can prove "proximate causation" only by direct evidence, and not by circumstantial evidence.

10. In response to a carefully phrased hypothetical question posed by defendant's counsel to the plaintiffs' expert (which the defendant stumbled upon when the trial court required the plaintiffs to proffer all of the expert's testimony, and allowed the defendant to cross-examine him at length, prior to submission of his testimony to the jury (T. II 6-122)), the plaintiffs' expert also opined that, on the specific facts given in the question, it was improbable that the defect caused the accident (T. II 191-92). As Judge Kravitch noted in dissent below, however, the expert's testing had been performed on a mock up which did not have power steering. In operation of the mock up, the expert had observed a noticeable "change of feel" in the system immediately prior to a "stone interference" problem. The hypothetical question which produced the unfavorable opinion contained no information concerning a "change of feel" prior to the lockup, and that, according to the expert, was the *sole* basis for his response to the question. Elsewhere in his testimony, the expert testified that he did *not* know whether there would be a "change of feel" in a power-assisted system—which essentially destroys the probative value of the response given to the hypothetical question (T. II 181-83, 192).

When the case was submitted to it, the jury took the defendant's experts at their word concerning the "possibility" that the accident could have been caused by the defect; it determined to believe Mr. Fenner's direct evidence that the accident was caused by a steering system malfunction (and not by driver blackout, carelessness, or a tire failure); it drew the only reasonable inference available to it concerning the causal link between the proven defect and the proven malfunction; and it returned a verdict finding the defendant liable, and assessing the plaintiffs' damages in the amount of $250,000.00 (R. 678).

Notwithstanding the command of the Seventh Amendment that "no fact tried by a jury shall be . . . re-examined in any Court of the United States . . .", the District Court granted the defendant's motion for judgment n.o.v. in a short memorandum order which concluded, in essence, that the inference drawn by the jury that the defect caused the accident was too "speculative" to support the verdict (R. 767).[11] A judgment was subsequently entered in favor of the defendant (R. 774), and the plaintiffs appealed the judgment to the United States Court of Appeals for the Fifth Circuit (R. 783). In a split (2-1) decision, the Court affirmed the defendant's judgment, holding that the Fenners were "not entitled to a verdict based on speculation and conjecture." 657 F.2d at 651.[12]

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11. The District Court also alternatively granted the defendant's motion for new trial on the ground that the verdict was against the manifest weight of the evidence, for precisely the same reason. As noted in footnote 1, *supra*, the propriety of that order is also in issue here. The second issue will not unduly complicate this proceeding, however, since a determination of the primary issue in our favor will necessarily be dispositive of the second issue.

12. The Court's conclusion was rested upon *Smith v. General Motors Corp.*, 227 F.2d 210 (5th Cir. 1955). An examination of that decision will clearly reveal the majority's misunderstanding

(Continued on following page)

The decision provoked a vigorous dissent from Judge Kravitch, in which she pointed out that the majority's decision was in conflict with prior decisions of the Fifth Circuit allowing proof of a products liability action by proof of a malfunction in the product and/or proof negating possible alternative causes of the accident other than a defect in the product. Judge Kravitch also pointed out that the majority's decision was in conflict with similar cases in the D.C. Circuit. Although at least one of the judges in active service in Unit B of the Fifth Circuit (Fla., Ga., Ala.) requested that Unit B of the Court be polled upon our suggestion for rehearing en banc, the

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Footnote continued—

of the issue involved in this case. In *Smith*, the driver of one of General Motors' automobiles was killed when the automobile left the road surface and struck a bridge abutment. Because of the lack of witnesses, there was "no *direct* evidence available to show what the actual events in dispute were". 227 F.2d at 210 (emphasis supplied). The Court held that the circumstantial evidence presented created a permissible *inference* that a loss of steering control had occurred from a defect in the steering system, but it approved the trial court's directed verdict against the plaintiff because the circumstantial evidence presented also created a permissible inference that the accident was caused by "human failure" of the driver. In view of the existence of two equally reasonable *inferences* of causation, and the absence of any *direct* evidence tending to prove or disprove either of them, the Court held that the jury would simply be speculating if it were allowed to choose one equally reasonable inference over the other.

In the instant case, however, the jury was *not* required to speculate and select between two or more equally reasonable *inferences* drawn from circumstantial evidence, because there *was* "direct evidence available to show what the actual events in dispute were". All that the jury had to do was to find Mr. Fenner credible (which was *its* function, not the Court's function) and believe his *direct* (as opposed to circumstantial) evidence that the accident was caused by a steering system malfunction, and that it was not caused by human failure or tire failure. The lower court's reliance upon *Smith* clearly reveals that it misunderstood the difference between *direct* evidence and *inferences* drawn from circumstantial evidence—and, in our judgment, it is this misunderstanding which led to the serious error which we seek to have rectified here.

Court declined to resolve the intra-circuit conflict, and our petition for rehearing was denied.[13] This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

At first blush, it may appear to the Court that we merely intend to quarrel here with the lower court's analysis of the "sufficiency of the evidence". We are extremely concerned about this "first blush", because we are aware that this Court has neither the time nor the inclination to review such cases.[14] We therefore think it important at the outset to assure this Court that our complaints here go to much more fundamental concerns of far wider importance than a mere quarrel with the lower court's myopic view of the evidence. This case is simply not a mere "sufficiency of the evidence" case. Our complaints here

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13. Because of a local rule in effect at the time our suggestion for rehearing en banc was filed, the Judges of Unit A of the Fifth Circuit (Tex., La., Miss.) did not participate in the poll.

14. This limitation upon the Court's supervisory powers is regrettable, because the lower courts have apparently sensed that they are no longer "accountable" to this Court, as a practical matter, when only the "sufficiency of the evidence" is in issue. The result has been, in our estimation, a distressing trend in the direction of erosion of the Constitutional function of the jury in our system of jurisprudence, without fear of reversal of that trend. In this connection, we note that the Court below initially stamped "Do Not Publish" upon its opinions in this case, perhaps in order to attenuate further its only "theoretical" accountability to this Court. The decision was not released for publication until our suggestion for en banc rehearing was denied. We can only speculate upon the reasons for this curious turn of events—but it is possible that we ultimately provoked publication of the decision by our suggestion that a split decision of the Court (expressed in opinions totalling 10-pages in length) which approved the setting aside of a unanimous jury verdict in the amount of $250,000.00 against America's largest corporation and in favor of two badly maimed plaintiffs, was precisely the type of decision which should be published, and that we could not help but feel that the decision to withhold publication betrayed a considerable amount of self-doubt in the correctness of the decision.

concern, in the words of Mr. Justice White, "those elements that define the character of the judicial process itself". *Novak Inv. Co. v. Setser,* ..... U.S. ..... (1981) (50 USLW 3401) (dissenting opinion).

First, although the Court below purported merely to pass upon the "sufficiency of the evidence", it inadvertently violated a fundamental element of the Seventh Amendment's right to a jury trial by judging the credibility of the witnesses in the course of its analysis of the evidence (because of its failure to recognize the substantial difference between *direct* evidence and *inferences* drawn from circumstantial evidence). Second, although the result in the case is couched primarily in terms of "sufficiency of the evidence", the decision actually turns upon an implicit rejection of a *legal* principle—a heretofore judicially accepted *method* (in the nature of an assignment of the burden of proof) of proving a *prima facie* products liability case with circumstantial evidence. This aspect of the decision creates conflict with decisions of several of the other Courts of Appeal which approve the *method* of proof rejected below, and it also creates conflict within the Fifth Circuit itself.

Third, the Court's conclusion that the jury could not disbelieve the uncontradicted opinion testimony of the experts creates both inter-circuit and intra-circuit conflict, and conflicts with a long line of decisions in this Court. And finally, the Court's conclusion could not have been reached under Florida law if this diversity action had not been removed from the Florida state court in which it was filed, and the decision therefore directly subverts the mandate of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938)—that the outcome of a state law action should not be different in a federal court merely because of the diversity of citizenship between the parties. We elaborate briefly upon each

of these important reasons for granting the writ in the argument which follows.

1. The Court below inadvertently passed upon the credibility of the witnesses, in violation of the Seventh Amendment.

In most of the cases concerning "sufficiency of the evidence" brought here for discretionary review, the Court below has properly followed the *legal* precepts derived from the Seventh Amendment which govern analysis of the "sufficiency of the evidence", and this Court is asked merely to reevaluate the evidence a third time. Although these types of cases are often couched in terms implicating Seventh Amendment rights, no direct violation of the Seventh Amendment has occurred, and it is readily understandable why review is ordinarily denied. We do not believe that this case is one of those cases. In this case, the Court did *not* follow the legal requirements of the Seventh Amendment governing analysis of the "sufficiency of the evidence"; rather, it directly violated a fundamental precept of the Seventh Amendment by inadvertently passing upon the credibility of the witnesses during its analysis of the evidence. We think this violation of the petitioners' constitutional rights is sufficient to remove this case from the category of the "typical" case, and justify the exercise of this Court's power of supervision.

It is too well settled to require extensive citation of authority that the jury is the *sole* judge of the credibility of witnesses in proceedings where the constitutional right to a jury trial is invoked. *See, e.g., Ewing v. Burnet,* 11 Pet. 41 (1837); *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76 (1891); *U.S. v. Bailey,* 444 U.S. 394 (1980). A corollary of this principle is equally well settled: a federal court must not pass upon the credibility of the witnesses in its analysis

of the "sufficiency of the evidence"; rather, it is required to accept the direct evidence favorable to the verdict as true, and indulge every reasonable inference which can be drawn from the evidence in favor of the verdict. *See, e.g., Lavender v. Kurn*, 327 U.S. 645 (1946); 5A *Moore's Federal Practice*, ¶50.07[2] (and decisions collected therein). In this case, Mr. Fenner provided *direct* evidence that the accident was caused by a steering system lockup, and not by a blackout, carelessness, or a tire failure. The jury found this testimony credible. The lower court was therefore required by the Seventh Amendment to *begin* its analysis of the sufficiency of the evidence with those facts established as true.

The lower court did not credit Mr. Fenner's direct testimony as true at the threshold of its analysis, however, because it failed to recognize the difference between *direct* evidence and *inferences* drawn from circumstantial evidence. It treated Mr. Fenner's direct testimony as having no more probative value than an inference—and it *held* that the jury could not properly reach the conclusion that the defect caused the accident because of the existence in the record of equally reasonable inferences of other possible causes of the accident:

> . . . In order to reach this conclusion [that the defect caused the accident], the jury would have to disregard the evidence of other possible causes.
>
> Plaintiffs are not entitled to a verdict based on speculation and conjecture. . . .

657 F.2d at 651.

It is in this erroneous conclusion that the Court violated the Seventh Amendment. The jury simply did *not* have to disregard the circumstantial evidence of other possible causes of the accident in order to conclude that the defect

caused the accident. All it had to do was find Mr. Fenner's testimony credible, which it did, and it could find on the *direct* evidence that the accident was caused by a steering system malfunction and not by any other possible cause. A single, perfectly reasonable inference was thereafter required—that the steering system malfunction testified to by Mr. Fenner was caused by the only explanation for it in the record, the defect in the automobile.

Holding that the jury could not find that the defect caused the accident without "disregard[ing] the evidence of other possible causes" is tantamount to holding that the jury was *required* to "regard the evidence of other possible causes". But before the jury could "regard" those other possible causes, it would first have to disbelieve Mr. Fenner's testimony that none of those other possible causes were the cause of the accident. In effect, the lower court held that the jury could not believe Mr. Fenner's direct evidence concerning the cause of the accident. The jury had a right to believe Mr. Fenner, and it did. The lower court's conclusion that the jury was not free to believe Mr. Fenner and reach a conclusion concerning the cause of the accident supported by his direct testimony directly violated the Seventh Amendment, and it is respectfully urged that this Court exercise its power of supervision to restore to the Fenners their constitutional right to have a *jury*, not a court, judge their credibility.

2. The decision below conflicts with the decisions of other Courts of Appeals concerning accepted methods of proving a *prima facie* case in a products liability action.

There are probably thousands of products liability actions filed in or removed to the lower federal courts every year, so the repercussions of the decision below will spread

far beyond the narrow confines of this single case. In a substantial number of these cases, the product itself will have been destroyed and, if the elements of the case are to be proven at all, proof of them must depend upon inferences drawn from circumstantial evidence. The propriety of proving a products liability case in such a fashion has been addressed by several of the other Courts of Appeals, and they have all concluded as the dissenting judge in the instant case concluded—that a *prima facie* case requiring resolution by a finder of fact is proven by direct evidence that the product malfunctioned in a manner which caused the plaintiff's injuries, and/or by direct evidence sufficient to satisfy the jury that the plaintiff's injuries were not caused by something other than a defect in the product.[15]

The Fenners proved their case to the satisfaction of the jury both ways, and it is apparent from the decisional law in other circuits that their verdict would not have been taken away by federal courts in the Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits. A plaintiff in a products liability action in the Fifth Circuit, however, must now produce the product which maimed or killed him, and autopsy it in front of the jury before he can withstand a motion for directed verdict. We respectfully urge that this

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15. *E.g., Hall v. General Motors Corp.*, 647 F.2d 175 (D.C. Cir. 1980); *Stewart v. Ford Motor Co.*, 553 F.2d 130 (D.C. Cir. 1977); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2nd Cir. 1976); *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121 (2nd Cir. 1975); *Sochanski v. Sears, Roebuck & Co.*, 621 F.2d 67 (3rd Cir. 1980); *Kridler v. Ford Motor Co.*, 422 F.2d 1182 (3rd Cir. 1970); *Greco v. Bucciconi Engineering Co.*, 407 F.2d 87 (3rd Cir. 1969); *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977); *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *Longenecker v. General Motors Corp.*, 594 F.2d 1283 (9th Cir. 1979); *Summers v. Interstate Tractor & Equipment Co.*, 466 F.2d 42 (9th Cir. 1972); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (9th Cir. 1971). *See Leathers v. General Motors Corp.*, 546 F.2d 1083 (4th Cir. 1976).

Court exercise its supervisory jurisdiction to ensure that the thousands of persons injured by defective products who seek relief in the federal courts of this nation every year receive uniform treatment when facing a moton for directed verdict, wherever their suit may have been filed.

3. The decision below conflicts with decisions of this Court and other Courts of Appeal concerning the conclusiveness of expert testimony.

In the instant case, the Court held that the inference of "proximate causation" could not properly be drawn by the jury where it was "at war with uncontradicted or unimpeached facts". 657 F.2d at 651. The "uncontradicted *facts*" to which it referred in affirming the defendant's judgment were the experts' *opinions* that the "stone interference" problem "was not [the accident's] cause based on Mr. Fenner's facts". 657 F.2d at 650. Quite apart from the Court's error in failing to recognize that "opinions" are not "facts", its conclusion is in direct conflict with this Court's decision in *Sartor v. Arkansas Nat. Gas Corp.*, 321 U.S. 620 (1944)—and numerous other decisions collected in that opinion—in which it was held in no uncertain terms that juries are not bound by the uncontradicted opinions of expert witnesses:

> In considering the testimony of expert witnesses as to the value of gas leases, this Court through Mr. Justice Cardozo has said: "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury or to a judge or to a statutory

> board." [Citations omitted]. The rule has been stated "that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." Spring Co. v. Edgar, 99 US 645, 658. "The jury even if such testimony be uncontradicted, may exercise their independent judgment." The Conqueror, 166 US 110, 131. "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." Sonnentheil v. Christian Moerlein Brewing Co., 172 US 401, 408.

321 U.S. at 627-28. Other Courts of Appeal have followed this rule of law, as they are bound to do. *See, e.g., Jones v. N.V. Nederlandsch-Amerikaansche Stoomvaart M.*, 374 F.2d 189 (3rd Cir. 1966). It is respectfully urged that the lower court's departure from this well-settled proposition requires the exercise of this Court's power of supervision.

The decision below also stands in stark conflict with a leading federal decision in the law of products liability, *Fortunato v. Ford Motor Co.*, 464 F.2d 962 (2nd Cir.), *cert. denied*, 409 U.S. 1038 (1972). In that case, the defendant/automobile manufacturer's expert testified that it was physically impossible for the plaintiff's automobile to have caught fire in the manner described by the plaintiff; the defendant sought a judgment n.o.v., invoking the "physical facts rule"—which allows a court to direct a verdict where the evidence supporting a plaintiff's case is clearly contrary to indisputable physical facts. The court surveyed the evidence and found expert testimony in the record that such an occurrence was at least a "possibility", and held that the "physical facts rule" could not be applied in such

a case to deny a plaintiff the right to a jury determination of his claim.[16]

In contrast, in the instant case the Court held that the necessary inference of "proximate causation" could not properly be drawn by the jury where it was "at war" with the expert opinion testimony. 657 F.2d at 651. Putting aside once again the Court's erroneous equation of "facts" and "opinions", we note simply, as the dissenting judge pointed out, that "[b]oth defense experts conceded that stone interference could occur after a right turn", 657 F.2d at 652. The majority also acknowledged that it was "possible" that the defect in the automobile could have caused the accident described by Mr. Fenner. If *Fortunato* had been followed in this case, the "physical facts rule" could not have been applied to negate Mr. Fenner's direct testimony, and the plaintiffs' verdict would not have been disturbed. That *Fortunato* and this case stand in stark conflict on precisely the same point is an additional reason why this Court should exercise its supervisory power to ensure uniformity of decisions in the federal system.

4. The decision below conflicts with other decisions of the Fifth Circuit in the same areas in which it creates inter-circuit conflict and conflict with this Court's decisions.

There are also numerous prior decisions of the Fifth Circuit which hold that a plaintiff in a products liability

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16. *See,* in addition, *Lavender v. Kurn*, 327 U.S. 645, 652 (1946):

> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. . . . But such evidence has become irrelevant on appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court.

action presents a *prima facie* case requiring resolution by a finder of fact when he proves by direct evidence that the product malfunctioned in a manner which caused the plaintiff's injuries, and/or when he offers direct evidence sufficient to satisfy the jury that the plaintiff's injuries were not caused by something other than a defect in the product.[17] Similarly, there are numerous prior decisions of the Fifth Circuit which hold that "jurors are not bound to accept the uncontradicted opinions of expert witnesses but have a right to use their own common sense and experience and to draw all reasonable inferences from the physical facts and occurrences". *Remington Arms Co., Inc. v. Wilkins,* 387 F.2d 48, 54 (5th Cir. 1967).[18] As the dissenting judge below pointed out, the majority's decision is in conflict with both lines of authority in the Fifth Circuit.

We recognize that intra-circuit conflict is not ordinarily a sufficient reason for invoking this Court's discretionary jurisdiction—since intra-circuit conflicts are, at least in theory, supposed to be resolved by the Court itself, sitting en banc. There are very unusual circumstances in the instant case, however, which make this conflict more in the nature of an *inter-circuit* conflict than an internal matter. In anticipation of the split of the "former Fifth Circuit" into the "new Fifth" and Eleventh Circuits, the Fifth Circuit divided itself into two units—Unit A, consisting of the judges from Texas, Louisiana, and Mississippi who would comprise the new Fifth Circuit; and

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17. *E.g., Franks v. National Dairy Products Corp.,* 414 F.2d 682 (5th Cir. 1969); *Vandercook & Son, Inc. v. Thorpe,* 395 F.2d 104 (5th Cir. 1968); *Remington Arms Co., Inc. v. Wilkins,* 387 F.2d 48 (5th Cir. 1967); *Ford Motor Co. v. Mathis,* 322 F.2d 267 (5th Cir. 1963).

18. *See,* in addition, *Jenkins v. General Motors Corp.,* 446 F.2d 377 (5th Cir. 1971), *cert. denied,* 405 U.S. 922 (1972); *Franks v. National Dairy Products Corp.,* 414 F.2d 682 (5th Cir. 1969); *Ford Motor Co. v. Mathis,* 322 F.2d 267 (5th Cir. 1963).

Unit B, consisting of the judges from Florida, Georgia, and Alabama who would comprise the new Eleventh Circuit. This Florida case was assigned to Unit B of the Court. Because of a local rule in effect at the time the decision was rendered in this case, only the judges of Unit B were polled (at the request of one of the judges in Unit B) upon our suggestion for en banc rehearing. The judges of Unit A were not polled, and therefore had no opportunity whatsoever to determine whether an intra-circuit conflict existed, or whether it should be resolved. Because of another rule of the Fifth Circuit, however, subsequent panels of the Fifth Circuit are now bound by the precedent created by the instant decision. *See, e.g., Williams v. Blazer Financial Service, Inc.*, 598 F.2d 1371 (5th Cir. 1979).

Although we can only speculate concerning the probable outcome of this case if the Unit A judges had been allowed to vote on our suggestion for rehearing en banc, we think there is a distinct possibility that our suggestion might have been granted if those judges had participated. We base that assertion upon *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980), which was decided by a panel of Unit A judges shortly after the decision in the instant case was filed. In that case, the Court followed the authority rejected by the Court in the instant case, holding that an inference that pilot negligence caused an aircraft crash was sufficient to present a jury question, where the possible alternative cause suggested by the evidence (a pilot heart attack) had been negated to the satisfaction of the jury. Since there is, in reality, a conflict between the "new Fifth Circuit" and the Eleventh Circuit on the point involved here (which the "former Fifth Circuit" had no opportunity to resolve), the exercise of this Court's power of supervision to resolve conflict among the federal courts is appropriate, notwithstanding that the conflict

presented is technically "intra-circuit" only. We respectfully urge the exercise of that power of supervision so that the law in both the Fifth and the Eleventh Circuits does not remain completely muddled by the decision in this case.

5. The Court below refused to recognize a legal presumption created by Mr. Fenner's testimony under Florida law and thereby reached a result impermissible under Florida law, in conflict with this Court's decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437 (1959).

As noted previously, this state law action was originally filed in state court. If it had remained there, the outcome would clearly have been different. In Florida, it is firmly established that "proximate causation" may be proved inferentially by circumstantial evidence as conclusively as it can be proved by direct evidence. *See Tucker Bros., Inc. v. Menard*, 90 So.2d 908 (Fla. 1956); *Majeske v. Palm Beach Kennel Club*, 117 So.2d 531 (Fla. 2nd DCA 1959), *cert. denied*, 122 So.2d 408 (Fla. 1960). And, as the Fifth Circuit has itself recognized, under Florida law the question of "proximate causation" is always a factual question which must be resolved by the jury unless the facts are susceptible of only one inference. *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981).[19]

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19. *See Helman v. Seaboard Coast Line Railroad Co.*, 349 So.2d 1187, 1189 (Fla. 1977) ("The question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question."); *Welfare v. Seaboard Coast Line Railroad Co.*, 373 So.2d 886, 888 (repeating this admonition as "our directions to the appellate courts of this state").

Also lurking in this case is the question whether it is proper to apply a state or federal test of "sufficiency of the evidence"

(Continued on following page)

In products liability actions, Florida allows a plaintiff to prove a *prima facie* case requiring resolution by a finder of fact in exactly the manner in which the Fenners proved their case here—by presenting direct evidence of a malfunction in the product causing injury and/or evidence negating all possible causes of the injury other than a defect in the product:

> [The defendant] says that this finding depends upon [an] inference that the particular catheter—both ends of which were "routinely" discarded by the two hospitals involved—was faulty and a further inference that the portion which travelled to the heart was severed in this manner. This is a beguiling argument, but it is not an "inference upon an inference" as that misunderstood phrase is used in the cases. Of course a finding that the catheter was severed as a consequence of faulty manufacture is based on an inference. There is no direct proof of this fact. But all of the other possibilities are excluded by direct evidence which the jury could—and obviously did—believe. This leaves the inference of faulty manufacture sufficiently supported.

Footnote continued—

to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. In Florida, the standard of appellate review requires that a verdict be approved if there is *any* competent evidence to support it. *See Helman v. Seaboard Coast Line Railroad Co., supra.* The standard of review applied by the Fifth Circuit to this diversity case, however, was the "reasonable man" test adopted in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969), in which the Fifth Circuit limited this Court's only decision on the question to FELA actions. *See Lavender v. Kurn,* 327 U.S. 645, 653 (1946) ("Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear"). This Court has previously noted that the lower courts are not in agreement on this issue, and that it is an "important question", but it has not yet answered that question. *See Dick v. N.Y. Life Ins. Co.,* 359 U.S. 437, 445 (1959).

C. R. Bard, Inc. v. Mason, 247 So.2d 471, 471-72 (Fla. 2nd DCA), *cert. denied*, 251 So.2d 878 (Fla. 1971).[20]

The Court below refused to acknowledge that the Fenners had disproved the alternative possible causes of the accident by Mr. Fenner's direct testimony, so it obviously did not feel constrained to follow this principle of Florida law. But the Court was nevertheless wrong under Florida law, even if it were correct that the Fenners did not disprove the possible alternative causes, because Florida law also does not require a plaintiff to negate possible causes of his injury other than a defect in the product to present a case requiring resolution by the jury. All that a Florida plaintiff must do is prove that the product malfunctioned, causing the accident in issue (which Mr. Fenner's testimony clearly did in this case). At that point, "a *legal inference*, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a *prima facie* case for jury consideration." *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1148 (Fla. 1st DCA 1981). (Emphasis supplied). The "burden of persuasion" then shifts to the defendant:

> . . .[T]he practical result of the inference is that if the manufacturer wishes to avoid a jury's consideration of the issues, it must offer evidence showing there are no genuine issues of material fact to be resolved by a jury—rather than suggest possible reasons for the product's malfunction.

396 So.2d at 1151.

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20. *Accord, McCarthy v. Florida Ladder Co.*, 295 So.2d 707 (Fla. 2nd DCA 1974). *See Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3rd DCA 1975), *cert. denied*, 330 So.2d 14 (Fla. 1976); *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 177 (Fla. 1970); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2nd DCA 1967), *cert. denied*, 211 So.2d 212 (Fla. 1968).

The Circuit Court for the Fourth Judicial Circuit of Florida, in which this case was originally filed, is located within the jurisdiction of the District Court of Appeal, First District, which decided *Cassisi*—and this case would clearly have been controlled by *Cassisi* had it remained there. Although *Cassisi* was decided after the trial of this case, it was brought to the attention of the Court below by a notice of supplemental authority, at oral argument, and in the motion for rehearing.[21] *Cassisi* did not change the law of Florida in any way relevant to the instant case, since the Fenners negated the alternative possible causes of the accident; but *Cassisi* clearly prohibits the result reached by the Court below (which refused to acknowledge that the possible alternative causes had been negated), because it holds that a plaintiff need not even negate alternative possible causes of the accident to have his case submitted to a jury. The Court below simply ignored *Cassisi* in reaching the conclusion which *Cassisi* was specifically designed to prevent.

Cassisi holds unequivocally that Mr. Fenner's testimony that his steering system locked created a legal presumption that a defect in his automobile caused the accident, and it became the defendant's burden thereafter to conclusively disprove that legal inference to avoid having the case submitted to the jury—and that burden was not met by merely suggesting other possible causes for the accident. The lower court's failure to give the Fenners the benefit of this "legal inference" runs directly afoul of this Court's decision in *Dick v. N.Y. Life Ins. Co.*, 359 U.S.

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21. The Court below was *required* to follow *Cassisi*, notwithstanding that it was decided after the judgment under review; that conclusion is mandated by this Court's decision in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (*Erie R. Co. v. Tompkins* mandates that change in state law after federal district court enters judgment, but during pendency of appeal, must be applied by appellate court).

437 (1959). In that diversity case, state law provided a presumption that the death of an insured was accidental, which had the effect of placing the burden of persuasion upon the defendant/insurer in proving that the death resulted from suicide. According to this Court, the presumption had the same effect as the "legal inference" created by *Cassisi*:

> Under [North Dakota] law, it is clear that under the circumstances present in this case a presumption arises, which has the weight of affirmative evidence, that death was accidental. [Citations omitted]. Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide. [Citation omitted]. Under North Dakota law, this presumption does not disappear once the insurer presents any evidence of suicide. . . . Rather, the presumed fact (accidental death) continues and a plaintiff is entitled to affirmative instructions to the jury concerning its existence and weight. This is not to say that under North Dakota law the presumption of accidental death may not be overcome by so much evidence that the insurer is entitled to a directed verdict. For it is clear that where "there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide," or "the facts and circumstances surrounding the death [can]not be reconciled with any reasonable theory of accidental or non-intentional injury," the state court may direct a verdict for the insurer even though the insurer is charged with the burden of proving that death was caused by suicide. These state rules determine when the evidence in a "suicide" case is sufficient to go to a jury. They are not directed at determining when the presumption of accidental

> death is rebutted, and thus excised from the case, because, as stated above, the presumed fact of accidental death continues throughout the trial and has the weight of affirmative evidence.

359 U.S. at 442-44.

In *Dick*, the Court of Appeals ignored the state law presumption, and ordered entry of a judgment for the defendant on the ground that the plaintiff had not presented a *prima facie* case. On certiorari, this Court reversed the judgment of the Court of Appeals, holding as follows: "Under the Erie rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent [defendant] was required to shoulder the burden during the instant trial". 359 U.S. at 446. *Accord, Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939). *See* 1A *Moore's Federal Practice*, ¶0.314 (and decisions collected therein).

In short, this Court's decisions required the Court below to honor the "legal inference" created by *Cassisi*, to ensure that the outcome of this case would not be different than it would have been if the defendant had not removed the state law action to federal court. The lower court's refusal to follow Florida law on the point ultimately resulted in a victory for the defendant which it could not have obtained in a Florida state court.[22] If *Erie R. Co. v. Tompkins* and its progeny are to retain any vitality at all in this important area of products liability litigation, it is imperative that this Court exercise its power of super-

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22. Parenthetically, the decision also departs from Florida law in its conclusion that the jury could not find contrary to the uncontradicted expert opinion testimony. In Florida, a jury is free to disregard such testimony. *See Shaw v. Puleo*, 159 So.2d 641 (Fla. 1964); *Star Fruit Co. v. Canady*, 159 Fla. 488, 32 So.2d 2 (1947); *Gulf Life Ins. Co. v. Shelton*, 155 Fla. 586, 21 So.2d 39 (1945).

vision in this case to ensure that the Fenners' rights under Florida law are governed by Florida law—not a federal "common law" which produces a result impermissible under Florida law.

CONCLUSION

For all of these reasons, it is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the "former Fifth Circuit".

Respectfully submitted,

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APPENDIX

George FENNER and Catherine Fenner,
his wife, Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION, a
Delaware corporation,
Defendant-Appellee.

No. 79-2518.

United States Court of Appeals,
Fifth Circuit.
Unit B

June 8, 1981.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

This personal injury products liability suit arises out of a single car accident which occurred in Palm Beach County, Florida. Plaintiffs sued the manufacturer, General Motors Corporation, alleging a defectively designed steering coupling permitted stone interference in turning the vehicle which proximately caused their accident. A jury awarded plaintiffs $250,000. The district court, however, granted General Motors' post-trial Rule 50, Fed.R.Civ. P., motion for judgment notwithstanding the verdict and, in the alternative, a new trial, on the ground that there was insufficient evidence to establish that the product defect proximately caused the accident. This appeal followed. We affirm the judgment notwithstanding the verdict.

The district court considered the motion for judgment n.o.v. under the standard set forth in the oft-quoted *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75 (footnote omitted). The district court's careful and well-reasoned opinion reflects a proper appreciation of the considerations involved in overturning a jury verdict, in accordance with the law of this Circuit.

Neither party on appeal complains of any error in the admission of evidence. We therefore consider all the evidence which the district court charged the jury it could consider in deciding the case. *Spurlin v. General Motors Corp.*, 528 F.2d 612, 615 (5th Cir. 1976).

Based principally on Mr. Fenner's testimony, the evidence showed that in the early morning hours of December 15, 1972, Mr. Fenner and his wife left their hotel room in Pompano Beach, Florida. To get to the Florida turnpike, they traveled a short distance over a road under construction with loose gravel, potholes, and bumps. Mr. Fenner had driven on this road frequently over the past few days on business, always driving very carefully braking for the potholes and bumps. Traveling northbound, plaintiffs stopped at the first service center for breakfast and to have the car serviced. The attendant checked under the hood but did not call attention to anything. Mr. Fenner noticed a certain stiffness in the steering from the time he had turned onto the turnpike; it was as though his wheels were out of alignment. He attributed this to his driving over the road under construction.

Upon leaving the service center, Mr. Fenner drove at approximately 60 miles per hour in the right-hand northbound lane. Traffic was light that morning. The road was straight and smooth. He passed one vehicle, turning left into the passing lane then turning back into the right-hand lane. Approaching another vehicle, Mr. Fenner pulled into the left-hand lane and passed the vehicle while driving straight ahead. When Mr. Fenner started turning the steering wheel to the right in order to return to the right-hand lane, the "steering jammed," according to his testimony, and the car veered to the left into the median. Plaintiffs' car struck an overpass abutment, causing substantial injury to them. Mr. Fenner stated that he had

experienced no undue steering difficulties as he initially turned into the left-hand lane to pass the second vehicle. Only as he attempted to turn the wheel to the right did the steering difficulty occur.

Additional evidence revealed that for some weeks immediately after the accident Mr. Fenner had no memory of the accident or how it had occurred. During that period, he had speculated he had blacked out or some unknown mechanical difficulty with the car had been the cause of the accident.

There were two eyewitnesses to the accident who testified. Neither could say whether the Fenner vehicle appeared to be having steering difficulty. One of the eyewitnesses stated, however, that he observed a puff of smoke which appeared to come from the front left tire of the vehicle. The front left tire was flat on the car wreckage. He stated the car appeared to dip to the left before it went onto the median. The testimony of the other eyewitness, as well as that of the Florida Highway Patrolman who investigated the accident, shed no light on the cause of the accident. The Fenner vehicle was unavailable for later examination.

Plaintiffs contend that their 1972 Oldsmobile Delta 88 contained an inherent defect in the steering mechanism which caused the accident. Plaintiffs showed at trial that the uncovered steering coupling of their model vehicle could suffer from stone interference if a stone lodged between the steering coupling and the vehicle's frame. This stone interference could cause the vehicle's steering to lock up. Plaintiffs then attempted to show this is what happened with their automobile.

The district court found, and it is not challenged on appeal, that the Fenner's car was manufactured with an

inherent steering defect and that General Motors had knowledge of the defect. The court also found, however, that the evidence was not sufficient to create a jury question that the defect was the proximate cause of the accident.

[1] Proof of the defect alone is insufficient. There must also be evidence that the defect caused the accident. *See Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980). In *Lowe*, this Court held the plaintiffs had established proximate cause. After passing another automobile, the car in which Mrs. Lowe was riding, a 1971 Chevrolet Impala, returned to the right-hand lane and straightened out. The car then angled to the left again and eventually overturned down an embankment. The injured driver told a witness that the car had suddenly become impossible to steer. The wrecker driver who towed the car away examined the car and determined the steering had locked. After a more careful examination, the wrecker driver and a state trooper found a stone lodged inside the steering coupling.

The evidence in *Lowe* to prove causation is simply not present in this case. As in *Lowe*, the car driver, Mr. Fenner, complained of steering lock up. Unlike *Lowe*, there was no examination of the Fenner's automobile and no stone discovered lodged inside the steering coupling. Plaintiffs attempted to prove their theory by Mr. Fenner's testimony and the testimony of an expert witness. Unfortunately, plaintiffs' theory is not supported by Mr. Fenner's facts according to the expert witnesses.

Plaintiffs' expert had conducted extensive tests using a mock-up of the steering column of the Oldsmobile model in question. He concluded that under certain conditions stone interference with the steering could occur. He testified in order for such interference to occur on a right

turn there must have been a prior left turn, a noticeable change in the steering characteristics, and then the right turn and interference. When presented with a hypothetical question based on Mr. Fenner's version of the accident, plaintiffs' own expert expressed his opinion that Mr. Fenner's failure to be able to turn right was *not* due to stone interference since there was no indication by Mr. Fenner that any noticeable binding had occurred after the initial left turn into the passing lane.

One of defendant's experts, Mr. Flesher, whose deposition was read, examined testing done on the steering mechanism of the same model car as the Fenner's 1972 Oldsmobile. He stated the only way for rocks or gravel to get into a position where they could possibly drop into the steering coupling and interfere with the steering would be for the front frame crossmember to come into contact with the road surface and scoop up some gravel. This would be possible on roads under construction, he said, when one drives too fast over the road. The tires alone could not throw gravel and stones into the necessary position. He stated in his experience he had never observed stone interference when the wheel is turned to the right but it was theoretically possible.

Defendant's other expert, Mr. Sanderson, testified since the steering coupling is forward of the tires, they could not throw gravel into the necessary position to effect stone interference. He too said the front frame crossmember must strike the road and throw up the gravel. He also had never experienced any stone interference after a right turn although he admitted that it was not an impossibility. Like plaintiffs' expert, he opined that the failure to be able to turn right was not due to stone interference when presented with a hypothetical question based on Mr. Fenner's version of the accident.

Documentary exhibits admitted into evidence by the plaintiffs also indicate stone interference might occur only after a left turn and the front frame crossmember must strike the ground in order to scoop up gravel. *See, e. g.*, Plaintiffs' Exhibit Nos. 15, 24. Although various possibilities were suggested as the cause of the accident, there is no conflict among the experts as to what was not its cause based on Mr. Fenner's facts.

[2, 3] Without Fenner's automobile available for inspection, plaintiffs by necessity must prove causation by circumstantial evidence. This Court recognizes that a jury may properly reconstruct a series of events by drawing an inference upon an inference. *See Smith v. General Motors Corp.*, 227 F.2d 210 (5th Cir. 1955). The inference relied upon, however, must be reasonable. An inference may be unreasonable if it is "at war with uncontradicted or unimpeached facts." *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 851 (5th Cir. 1967).

In this case, the jury was required to infer that the front frame crossmember of the Fenner's car struck the surface of the road under construction and scooped up gravel. Mr. Fenner's testimony was that he drove very carefully over the road, braking for potholes and bumps. The jury would have to infer that a stone was carried from the time the Fenners entered the turnpike then dropped into position to cause stone interference without a noticeable change in the steering after the left turn; that stone interference occurred while turning the steering wheel to the right; and that the stone interference caused the steering wheel to lock and the Fenner car to veer left into the median and the abutment. In order to reach this conclusion, the jury would have to disregard the evidence of other possible causes.

[4, 5] Plaintiffs are not entitled to a verdict based on speculation and conjecture. *See Smith v. General Motors Corp.*, 227 F.2d 210 (5th Cir. 1955). The district court held the evidence in this case was so overwhelmingly in favor of the defendant that reasonable men could not arrive at a contrary verdict and granted defendant's motion for judgment n.o.v. The record supports that decision.

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

Respectfully, I dissent. The majority affirms the trial court's grant of judgment notwithstanding the verdict on the ground that plaintiffs failed to prove that the admitted defect in the steering mechanism caused the accident. In my judgment, plaintiffs submitted sufficient evidence to create a jury question on the issue of proximate causation; the district court, therefore, erred in granting a JNOV.

George Fenner testified that as he was driving north on the Florida Turnpike, the steering "jammed," and his automobile veered to the left into the median and struck an abutment. It is undisputed that the Fenners' car was manufactured with an inherent steering defect, (i. e., the possibility of stone interference) and that General Motors had knowledge of the defect. The issue at trial was whether this defect was the proximate cause of the accident.

Evidence at trial showed that General Motors was aware of the defect in Oldsmobile Delta 88 models and that the defect could be corrected by installation of an inexpensive shield device; it had not, however, warned the Fenners of the defect and potential danger. The car was totally demolished by the impact and was never returned to the Fenners. Unfortunately, both Fenners were severely injured and hospitalized. As a result, the car

was not subjected to an auto autopsy to ascertain the possible presence of a stone. Moreover, as noted above, General Motors had not notified the Fenners of the possibility of stone interference; consequently, they had no reason to examine the steering mechanism for a stone before the automobile was disposed of.

Because the automobile was not inspected after the accident, the plaintiffs attempted to prove causation by circumstantial evidence. The majority concludes that in order to find that stone interference caused the accident, the jury must have engaged in speculation and conjecture. I disagree. In *Franks v. National Dairy Products Corp.*, 414 F.2d 682 (5th Cir. 1969), a products liability case, this court held that circumstantial evidence of causation is sufficient to present a jury question where the plaintiff has negated all other possible causes. General Motors asserts that the accident could have been caused by driver carelessness, a medical blackout, a blown tire, or any number of other causes. It did not, however, present any direct evidence that an event other than steering malfunction caused the accident. The majority notes that one witness observed a puff of smoke which appeared to come from the front left tire which was flat on the wreckage and that the car appeared to dip to the left. This was contradicted by testimony of an eyewitness that the car did not dip to the left and by the state trooper who testified that the tire marks discounted the flat tire theory. This conflicting testimony created a question of fact for the jury.[1]

Mr. Fenner testified that he did not suffer a blackout nor did the tire blow out; rather, he stated that the steer-

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1. *See Sosa v. Coleman*, 646 F.2d 991, 995 (5th Cir. 1981) (holding that under Florida law the issue of proximate cause is a factual question that must be submitted to the jury unless the facts are susceptible of only one inference).

ing locked for no apparent reason. Thus, through his testimony plaintiffs offered direct evidence that the steering malfunctioned. Mr. Fenner's credibility was for the jury to decide, not for the trial judge or this court. If the jury believed his testimony, the only inference necessary was that the admitted steering defect caused the steering malfunction. In the absence of evidence to the contrary, I find such an inference entirely reasonable, in fact more logical than the inference we upheld in *Franks*: here, the defect was proven; there, we permitted the fact finder to infer from circumstantial evidence both the existence of a defect in the product and that the defect caused the plaintiff's injuries.[2]

The majority emphasizes that the expert testimony is uncontradicted that stone interference could not have caused the accident. I do not find this testimony conclusive. Both defense experts conceded that stone interference could occur after a right turn; they concluded, however, that a stone could not have entered the steering coupling based on Mr. Fenner's facts. Plaintiffs' expert, in answer to a lengthy hypothetical question and based upon tests performed by him on a mock-up of the steering column similar to the Oldsmobile model, stated that the accident

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2. The D.C. Circuit has held that in an automobile accident products liability case, a plaintiff may prove the existence of a defect by circumstantial evidence that 1) tends to negate causes for the accident other than a defect in the car, and 2) tends to show that the defendant-manufacturer introduced into the car whatever defect that might have existed. *Stewart v. Ford Motor Co.*, 553 F.2d 130, 137 (D.C.Cir.1977). The amount of evidence necessary for these showings is not great. *Id.* Furthermore, the D.C. Circuit has held that a case may go to the jury not only on a specific theory that an identifiable automobile part had failed, but also on the basis of a general theory that some unpinpointed defect introduced into the automobile by the manufacturer was responsible for the accident. *Hall v. General Motors Corp.*, 647 F.2d 175, 179 (D.C.Cir.1980).

was not due to stone interference. He based this conclusion on the fact that no noticeable binding occurred in the steering after his initial left turn. Plaintiffs' expert, however, conducted all of his tests on a model that was static and did not have power steering as did the Fenner vehicle. For that reason, his opinion would not be conclusive. Moreover, jurors are not bound to accept the uncontradicted opinions of expert witnesses, but have a right to use their own common sense and experience to draw all reasonable inferences from the physical facts and occurrences. *Remington Arms Co. v. Wilkins,* 387 F.2d 48 (5th Cir. 1967).

Hence, I find that plaintiffs submitted sufficient evidence to create a jury question as to the cause of the accident. *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969). Accordingly, I dissent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 74-446-Civ-J-C

GEORGE FENNER and CATHERINE FENNER,
his wife,
Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION,
a Delaware corporation,
Defendant.

ORDER

(Filed May 16, 1979)

This personal injury/products liability case was tried before a jury which returned a verdict for the Plaintiffs in the amount of $250,000.00. The Defendant has moved pursuant to Rule 50, F.R.Civ.P., for a Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial. For the reasons set forth below, both of the Motions will be granted.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

In passing on a motion for Judgment Notwithstanding the Verdict under Rule 50, the Court is bound by principles stated in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) (*en banc*):

> On motions for directed verdict and for judgment notwithstanding the verdict, the Court should consider all of the evidence - not just that evidence which sup-

ports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of the witnesses.

With this standard in mind, a review of the allegations and the evidence presented in this case reveals deficiencies which will not withstand analysis. The Plaintiffs contend that their 1972 Oldsmobile Delta 88 Automobile contained an inherent defect in the steering mechanism which was the cause of the single car accident from which this lawsuit arose. The amended complaint alleges that the Defendant was negligent in designing, manufacturing and inspecting the steering mechanism; that the Defendant is liable through a breach of implied warranty of fitness for intended use; and that the Defendant is liable under a theory of strict liability.

The Plaintiffs sought to establish at trial that the accident was caused by a stone which became lodged between the steering coupling and the frame of the vehicle and interfered with the steering of the vehicle. It was alleged that the Defendant knew of the defect and that "stone interference" as described above could occur under certain circumstances.

The Court finds that the evidence supports the conclusion that the Fenner's vehicle was manufactured with an inherent steering defect, and that the Defendant had knowledge of the defect. The evidence is not sufficient, however, to create a jury question on the Plaintiffs' theory that the defect was the proximate cause of the accident. Without undertaking an exhaustive analysis, the Court will review the evidence presented by both parties on the causation issue.

The only evidence of a steering problem in the Plaintiffs' vehicle was the testimony of the Plaintiff, George Fenner. Mr. Fenner stated that he noticed "some stiffness" in the steering from the time he began driving his vehicle on the Florida Turnpike until the time of the accident. He thought that perhaps the wheels were out of alignment since during the week prior to the accident he had frequently driven on a road which was under construction. He stated that the stiffness was as if the power steering had malfunctioned. The accident occurred as the Fenner vehicle was passing another vehicle and was changing from the left lane to the right lane of the highway. The Fenner vehicle had been proceeding in the left lane for a period of time. As Mr. Fenner started turning the steering wheel to the right in order to get back into the right lane, the "steering jammed" and the vehicle veered to the left into the median. The vehicle struck an overpass abutment, causing injury to the Plaintiffs. Mr. Fenner

stated that he had experienced no undue steering difficulty as he initially turned into the left lane to pass. Only as Mr. Fenner attempted to turn the wheel to the right did the steering difficulty occur.

Mr. Fenner's version of the accident, recounted above, was stated at the time of trial. The evidence revealed, however, that for some weeks immediately after the accident Mr. Fenner had no memory of the events which led to the accident. At that time he had speculated that he had blacked out, or that some unknown mechanical difficulty with the car had been the cause of the accident. He stated that he later realized what had occurred, and on that basis filed this suit.

There were two eyewitnesses to the accident who testified. Neither could say whether the Fenner vehicle appeared to be having steering difficulty. One of the eyewitnesses stated, however, that he observed a puff of smoke which appeared to come from the front left tire of the vehicle. He stated that the car appeared to dip to the left before it went onto the median. The testimony of the other eyewitness, as well at that of the Florida Highway Patrolman who investigated the accident, shed no light on the cause of the accident. The Fenner vehicle was unavailable for later examination.

Expert witnesses were presented by both parties. The Plaintiffs' expert, Clayton Morrison, had conducted extensive tests using a mock-up of the steering column of the Oldsmobile model in question. Mr. Morrison concluded that under certain conditions stone interference could occur. However, when presented with a hypothetical question based on Mr. Fenner's version of the accident, Mr. Morrison opined that the failure to be able to turn right would not be due to stone interference. This opinion was based on Mr. Morrison's experimentation which

showed that in order for a steering lockup to occur, some noticeable binding must occur initially on the left turn of the steering wheel. Mr. Fenner, as noted above, testified that he did not recall any steering difficulty as he initially turned the steering wheel to the left.

Expert testimony presented by the Defendant corroborated the opinion of the Plaintiffs' expert. The opinion of Mr. David Flesher, a senior project engineer for the Defendant, was based on testing done on the steering mechanism of the same model vehicle as that of the Fenners. He stated that in his experience he had never observed stone interference when the wheel is turned to the right. Mr. Richard Sanderson, an employee of the Defendant testifying as an expert, reached the same conclusions concerning the likelihood that the accident described by Mr. Fenner was caused by stone interference. Documentary exhibits admitted into evidence by the Plaintiffs are to the same effect. *See, e.g.*, Plaintiffs' Exhibit No. 24. Although the experts could not render an opinion as to the cause of the accident, there was no conflict among them concerning what was not its cause.

The Court is fully cognizant of the rule that in passing on a Motion for Judgment Notwithstanding the Verdict, it may not weigh the credibility of witnesses or assign weight to testimony based on the interest of a witness. *See, e.g., Kridley v. Bituminous Casualty Corp.*, 429 F.2d 88 (5th Cir. 1969). However, the Plaintiffs asked the jury to infer a series of occurrences from Mr. Fenner's version of the accident. While the Plaintiffs are entitled to all *reasonable* inferences from established facts, the *Court* must determine the reasonableness of the inferences drawn. And in so doing, for that purpose alone, it must undertake an analysis of the reliability and weight of the surrounding evidence from which a fact is to be inferred. This posi-

tion is in keeping with the established principle that a mere scintilla of evidence is insufficent to present a queston for the jury. *Boeing Co. v. Shipman, supra at* 374-375; *Moore v. Johnson,* 568 F.2d 1184 (5th Cir. 1978). Moreover, the Court recognizes that a jury may properly reconstruct a series of events by drawing an inference upon an inference. *See Smith v. General Motors Corp.,* 227 F.2d 210, 213 (5th Cir. 1955). Again, however, the inference relied upon must be reasonable. An inference may be unreasonable if it is "at war with uncontradicted or unimpeached facts." *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841, 851 (5th Cir. 1967). *See* 9 C. Wright and A. Miller, *Federal Practice and Procedure* §2528 at 565-569 (1971). The jury in this case of necessity relied upon several inferences which cannot withstand the light of reason.

In order to reach the verdict that it reached, the jury, at a minimum, was required to infer that a stone was thrown up under the Fenner vehicle; that the stone became lodged in precisely the position to cause steering interference; and that while turning the steering wheel to the right, the wheel locked causing the Fenner vehicle to veer to the left into the median, the last inference being "at war" with the uncontradicted expert testimony.

The Plaintiffs are not entitled to a verdict based on speculation and conjecture. The verdict in this case could rest on no other basis. The Court must thus conclude that the evidence in this case was so overwhelmingly in favor of the Defendant that reasonable men could not arrive at a contrary verdict. As a result, the evidence is insufficient as a matter of law to support the verdict reached by the jury. Accordingly, the Motion for Judgment Notwithstanding the Verdict shall be granted, and Judgment entered for the Defendant.

MOTION FOR NEW TRIAL

Despite granting the Motion for Judgment, N.O.V., the Court must conditionally rule on the Defendant's Motion for New Trial. Rule 50(c), F.R.Civ.P. It is clear that the Court may, in its discretion, grant a new trial when the jury's verdict is against the weight of the evidence. *See Urti v. Transport Commercial Corp.*, 479 F.2d 766, 768-769 (5th Cir. 1973); *Cities Service Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968). The Court's ruling on the Motion for Judgment Notwithstanding the verdict presupposes its position on the Defendant's Motion for New Trial. The verdict in this case was overwhelmingly against the weight of the evidence. Accordingly, the Motion for New Trial is conditionally granted.

DONE AND ORDERED in Chambers at Tampa, Florida, this 16th day of May, 1979.

/s/ George C. Carr
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2518
D. C. Docket No. 74-446-CIV-J-T

GEORGE FENNER, and CATHERINE FENNER,
his wife,
Plaintiffs-Appellants,

versus

GENERAL MOTORS CORPORATION,
a Delaware Corporation,
Defendant-Appellee.

Appeal From the United States District Court for the
Middle District of Florida

Before RONEY, HILL and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 16, 1981

KRAVITCH, Circuit Judge dissenting.
ISSUED AS MANDATE: SEP. 25, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B
No. 79-2518

GEORGE FENNER and CATHERINE FENNER, his wife,
Plaintiffs-Appellants,

versus

GENERAL MOTORS CORPORATION,
a Delaware Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/8/81, 5 Cir., 198.., ... F.2d .....).
(Sep. 9, 1981)

Before RONEY, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

. . . .

(X) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the Suggestion for Rehearing En Banc is also DENIED.

. . . .

ENTERED FOR THE COURT:
/s/ Paul H. Roney
United States Circuit Judge

Supplemental Brief

Office - Supreme Court, U.S.
FILED
JAN 26 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1045

In the Supreme Court of the United States

October Term, 1981

GEORGE FENNER and CATHERINE FENNER,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI*

In our petition for writ of certiorari, we asserted that the decision which we seek to have reviewed created

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*We are reluctant to add to the proliferation of papers in this Court, but we have determined after careful reflection that the development discussed here may significantly affect this Court's discretionary determination concerning the desirability of affording review. We have therefore chosen to avail ourselves briefly of Rule 22.6, which allows the filing of supplemental briefs "at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing". Although the decision brought to this Court's attention here was rendered a few weeks prior to the filing of our initial petition, it was not available to counsel until it was first published commercially *after* the filing of our initial petition.

inter-circuit conflicts with several of the other Courts of Appeals, and intra-circuit conflicts within the Fifth Circuit itself. At the time we filed our petition, the new Court of Appeals for the Eleventh Circuit had not announced its position concerning what "body of law" it would adopt as precedent. Shortly after we filed our initial petition, the first decision rendered by the Eleventh Circuit was published. That decision (by a unanimous court, sitting en banc) holds, *inter alia*, as follows:

> We hold that the decisions of the United States Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.

Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981).

Because of this holding, the decision which we seek to have reviewed is now binding precedent in both the Fifth Circuit and the Eleventh Circuit. As a result, the decision now creates inter-circuit conflicts between the Eleventh Circuit (as well as the Fifth Circuit) and several of the remaining Courts of Appeals, and creates intra-circuit conflicts within the Eleventh Circuit (as well as the Fifth Circuit). Put another way, the conflicts which we discussed in our initial petition have effectively been "doubled" by the *Bonner* decision. We think this is a substantial additional reason why this Court should exercise its supervisory power in this case to ensure uniformity

of decisions in the federal system—and we once again respectfully urge it to do so.

Respectfully submitted,

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Opposition

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NO. 81-1045

In the Supreme Court of the United States
October Term, 1981

GEORGE FENNER and CATHERINE FENNER
Petitioners,

vs.

GENERAL MOTORS CORPORATION
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S DETERMINATION THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

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Pursuant to Supreme Court Rule 28.1, the respondent, General Motors Corporation, notes that all U.S. and Canadian subsidiaries of General Motors Corporation are wholly owned with the exception of Motor Enterprises, Inc., which is partly owned by the U.S. Small Business Administration. Royal Insurance Companies of America is an independent insurance carrier for General Motors Corporation and may have a financial interest in the outcome of this litigation.

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STATEMENT OF THE CASE

Petitioners have sought review of a decision by the Fifth Circuit Court of Appeals which affirmed the trial court's action in granting a judgment n.o.v. on the basis that there was insufficient evidence to present a jury issue as to proximate causation.

This case arises out of a one-car collision on December 15, 1972, in which a 1972 Oldsmobile (T-I-34) owned and operated by petitioner George Fenner and equipped with power steering (T-I-94), struck the supporting column of an overpass on the Sunshine State Parkway (T-I-44-45). As a result of the accident, George Fernner and his wife Catherine, a passenger in the car, were injured (T-I-40-41).*

Plaintiffs' theory of recovery at trial was that the proximate cause of the accident was a defect in the design of the area between the car's "steering coupling" mechanism and its frame, which would allegedly allow a stone to become lodged between them and "lock up" the steering. This "stone interference" phenomenon was the subject of extensive expert testimony and documentary evidence. In this regard, two points are particularly important.

First, the evidence established, without contradiction, that the only way in which a stone can travel into the coupling-frame area is if the car's forward frame actually dips and touches the road surface so as to scoop up a stone and "carry" it into this area. In order for this to occur, the front wheels of a vehicle would have to be bouncing violently on the

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* For the Court's convenience, respondent will designate references to the record by the same abbreviations petitioners have used. Also, the terms "plaintiffs" and "petitioners" will refer to Mr. and Mrs. Fenner. At various times, the singular form of those terms are used, simply as a matter of style.

road (T-III-64-65, 83-87).

Second, assuming that a stone of the appropriate size and hardness was in fact "carried" into the coupling-frame area, the uncontradicted evidence presented by both parties was that stone interference could occur only during a left turn, since the mechanical configurations of the coupling-frame area would force a stone to be dislodged during a right turn (T-II-180-81; T-III-98; T-IV-136-38). In rare circumstances, stone interference could result during a right turn, but only if the steering wheel is first turned left, and the driver encounters a noticeable change in steering characteristics, and then immediately attempts to turn back to the right (T-II-180-83, 191-92; T-IV-179-80).

Mrs. Fenner was unable to remember any of the relevant events as to her husband's driving (T-I-153, 161). Accordingly, Mr. Fenner was the principal witness. He testified that early on the morning of the accident, he left Pompano Beach and proceeded toward the Sunshine State Parkway via Sample Road, which was under construction, marked by numerous potholes, and covered with rocks (T-I-37-38, 89). Due to the condition of this road, Mr. Fenner drove carefully while traveling over it, and took some fifteen or twenty minutes to traverse its 1½ to 2 mile length, averaging between 10 and 20 miles per hour (T-I-90). He testified that when he came upon a bump or pothole in the road he would apply his brakes and proceed slowly (T-I-90-91). Noticeably absent from Mr. Fenner's testimony is any statement or other indication that his car bounced so violently on this road as to cause the forward frame to scrape against the road surface.

After leaving Sample Road, Mr. Fenner entered the Parkway, at which time he noticed a "stiffness" in the car's steering (T-I-40, 94). At the time, he

surmised that the wheels might have gotten out of line or that the power steering was not functioning properly (T-I-40, 94-95). After driving for a while, he stopped at a service plaza for breakfast, making a right turn in doing so (T-I-96). Later, he made another right turn to re-enter the Parkway (T-I-97). There was no difficulty in making this turn (T-I-97), although Mr. Fenner testified that the steering still felt stiff when he left the service plaza (T-I-39, 41, 96).

Upon re-entering the Parkway, Mr. Fenner proceeded north in the right lane. At all relevant times, he was driving at an average speed of 60 to 65 miles per hour (T-I-39, 98-99). After a short time, he passed a car in front of him by turning left into the left lane, then to the right so as to travel in a straight line, and then turning back to the right to return to the right lane (T-I-101). At this time, Mr. Fenner was still experiencing the same stiffness in steering (T-I-40, 98, 101). Thereafter, he overtook a truck. Once again, he turned his steering wheel to the left to move into the left lane, then turned back to the right to straighten his car out (T-I-102). Mr. Fenner did not testify as to any noticeable change in steering characteristics at this point, whereas he did testify that the "stiffness" had remained unchanged from the time he entered the Parkway (T-I-101). He also stated that he traveled in the left lane in a straight line for "[a] few minutes, three minutes" (T-I-103). Then, having passed the truck, he attempted to turn the wheel to the *right* (T-I-103-04) and, according to plaintiff, was unable to do so. Mr. Fenner specifically testified that despite his efforts to turn the steering wheel to the *right*, his car continued to drift in a straight line gradually to the left (T-I-101-05), then left the roadway and struck a concrete abutment supporting an overpass.

Mr. Fenner was unable to recall if he attempted to apply his brakes before the impact (T-I-136).

However, the driver of the truck which he had passed did not notice any brake lights nor any appreciable decrease in the Oldsmobile's speed prior to the impact (T-IV-16). Likewise, the driver of another vehicle immediately behind Mr. Fenner's car never noticed any brake lights (T-IV-41). Additionally, the State Trooper who investigated the accident testified that there were no skid marks on the pavement and that, in his opinion, the cause of the accident was careless driving (T-III-154-55). In this regard, it should be noted that one of the documents introduced into evidence was an affidavit prepared two months after the accident by Mr. Fenner, in response to a careless driving citation (T-I-119-20), in which he stated that

> Neither I nor Mrs. Fenner have any knowledge, recollection or understanding as to what caused the accident...According to the medical doctors who attended Mrs. Fenner and myself, I may have suffered periods of momentary unconsciousness due to severe dehydration from eating (or being served) bad food the previous day. Another possibility is our automobile may have suffered a mechanical defect which may have been responsible for the accident. At this time I do not know the real or true reason or the cause or causes for the accident.

(DX-31; T-I-109; T-IV-104-05). Mr. Fenner's sworn statement that a momentary blackout on his part may have been the cause of the accident is also supported by hospital records introduced into evidence (T-I-21). Those records noted that Mr. Fenner had given a history that he "had some diarrhea and he blacked out and it was believed that this was the cause of his blackout." (PX-2).

The record also contains evidence that this collision may have been the result of a tire failure. The investigating State Trooper noted that the left front

tire was flat when he reached the scene of the accident (T-III-160-161), although he could not testify whether it became flat before or after the collision. Although photographs of the Fenner vehicle were introduced showing the flat left front tire, plaintiff's expert witness could not determine from the photographs whether the tire went flat before or after the collision with the bridge abutment (T-II-161).

The possibility that the accident resulted from a tire failure does not rest alone on the fact that the left front tire was flat after the collision. Halle Huntsinger, the driver of the vehicle immediately behind Mr. Fenner's car and an eyewitness to the impact (T-IV-31), noticed "some dust or smoke" which came from under the Fenner car while it was in the inside or left lane (T-IV-35), at a time when Mr. Huntsinger was driving some 60 to 80 feet behind the Fenner vehicle, which in turn was some 300 to 360 feet from the point of impact (T-IV-35, 42). The dust or smoke came from underneath the Fenner car, in the front left side of the vehicle (T-IV-37). Simultaneously, or immediately thereafter, Mr. Huntsinger saw some sparks coming from the same general area of the car (T-IV-37-38), and he thought that a tire had failed (T-IV-38). At the same time, the "attitude" of the car changed so that, instead of sitting level, it was sitting with its right rear higher than its left rear and in a nose-down "attitude" (T-IV-38-39), again leading Mr. Huntsinger to believe that there had been a tire failure (T-IV-39). It was at this time that the Fenner vehicle gradually started moving to the left in a straight line into the median (T-IV-39).

As the foregoing summary of the evidence indicates, plaintiff asserted that his accident was caused by "stone interference", despite unanimous testimony of all the expert witnesses that this

phenomenon could not have occurred given the sequence of turns and events testified to by Mr. Fenner. Moreover, there was a complete absence of any evidence to demonstrate that the existence of a defect in the vehicle was the proximate cause of the accident in question. Instead, plausible alternative explanations were clearly demonstrated by the evidence, including careless driving, momentary unconsciousness, loss of power steering fluid, and tire failure.

It was on this state of the evidence that the trial court granted General Motors' motion for judgment notwithstanding the verdict. The court found that "the evidence supports the conclusion that the Fenners' vehicle was manufactured with an inherent steering defect, and that the defendant had knowledge of the defect. The evidence is not sufficient, however, to create a jury question on the plaintiffs' theory that the defect was the proximate cause of the accident" (A-14). This conclusion was upheld on appeal, with the court observing that "[p]laintiffs are not entitled to a verdict based on speculation and conjecture...The district court held the evidence in this case was so overwhelmingly in favor of the defendant that reasonable men could not arrive at a contrary verdict...The record supports that decision." *Fenner v. General Motors Corporation*, 657 F.2d 647, 651 (5th Cir. 1981).

SUMMARY OF THE ARGUMENT

The Statement of the Case, as well as the opinions of both lower courts, shows that this cause only involves a fairly simple legal issue, albeit within a somewhat complex factual context; i.e., whether the evidence at trial was sufficient to support the jury's verdict. While petitioners have attempted to

transform this commonplace issue into a question of monumental proportions and implications, the issue nonetheless retains its essential simplicity. This cause does not involve disputed principles of law of great importance to the general public. Instead, this Court has been requested to exercise its discretion to review a matter which involves, at most, the application of settled law to a particular set of circumstances to resolve an isolated dispute between the parties. This alone should be an adequate basis for denying the Petition for a Writ of Certiorari. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

Beyond this consideration, there are other reasons which fully warrant the denial of the Petition. Not only did the Fifth Circuit Court of Appeals arrive at a conclusion which is completely proper, but it did so in a manner which is in harmony with the applicable law. Simply put, the court recognized that the burden was upon plaintiffs to establish, by a preponderance of the evidence, that a defect in their vehicle was the proximate cause of the accident which gave rise to their injuries. In the present case, plaintiffs failed to introduce sufficient evidence to show the casual link, because (1) the inference of causation relied upon by the plaintiffs was patently unreasonable; and (2) that inference did not in the least outweigh alternative inferences of causation. These two reasons, along with the Fifth Circuit's opinion, are discussed below. Following this general explication, we shall briefly respond to the specific arguments raised by petitioners.

ARGUMENT

A. THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S

DETERMINATION THAT THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THAT THE DEFECT AT ISSUE WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

The Fifth Circuit Court of Appeals began its analysis by referring to the standard for considering a motion for judgment n.o.v., as set forth in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury

> question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

The court, after reviewing the evidence, concluded that in this case, the evidence, including the reasonable inferences from that evidence, were so overwhelmingly in favor of the defendant that reasonable men could not arrive at a contrary verdict. This conclusion is totally consistent with the applicable law.

At the outset, it should be noted that petitioners place enormous emphasis upon Mr. Fenner's testimony that immediately before the accident, as he attempted to turn the steering wheel to the right, he "discovered [that he] couldn't turn it" (T-I-104). He also stated that "my steering locked on me..." (T-I-43). Momentarily disregarding other possible causes of the accident (such as a blackout), it is important to recognize that Mr. Fenner's testimony, fully accepted at face value, is direct evidence of one thing and one thing only: there was some sort of a steering lockup in the Fenner car. The question remains, however, as to whether the defect complained of actually caused this lockup. *See, e.g., Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143 (Fla. 1st DCA 1981).[1]

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1 As will be shown below, the evidence does not support on inference that "stone interference" was the cause of a "lock up", while the evidence does demonstrate the possibility of other causes for a "lock up". Sudden tire failure, especially if it occurred in combination with a prior loss of power steering fluid, is one of several viable explanations for such a "lock up". While additional evidence readily permits a reasonable inference that certain non-mechanical factors, such as carelessness or a blackout (as suggested by Mr. Fenner's own affidavit), could have independently caused the accident, we are presently concerned with only the alleged lockup.

Of course, since the Fenner car was not available for inspection, proximate cause had to be proven by circumstantial evidence which would allow a jury to reasonably infer the element of causation. In this respect, petitioners argue that Mr. Fenner's testimony as to a steering lockup required the jury to draw the inference that the purported lockup was caused by the defect at issue (Petition at 16). This argument is completely misplaced. On the facts of this particular case, no such inference was justified, much less required, because such an inference was not reasonable, nor did it preponderate over other possible inferences.

It is axiomatic that before an inference can serve as the basis for a jury's verdict, the inference must be reasonable. *See, e.g., Fenner*, 657 F.2d at 651. *See also Johnson v. Dicks*, 76 So.2d 657, 661 (Fla. 1954). This element of reasonableness is to be determined in light of the evidence in its entirety. *Cf. Hartnett v. Fowler*, 94 So.2d 724, 725 (Fla. 1957) (a motion for a directed verdict should be granted "when the evidence considered in its entirety and the reasonable inferences to be drawn therefrom fail to prove the plaintiff's case..."); *Boeing Co.*, 411 F.2d at 374 (essentially the same observation).

The Fifth Circuit, after fully recognizing that the reasonableness of any given inference must be determined within the total evidentiary context of a trial, pointed out why the jury could not possibly have inferred, in any reasonable manner, that the defect at issue caused the alleged lockup. As the court observed, to infer that the defect caused the alleged lockup on the basis of the evidence presented, "the jury was required to infer that the front frame crossmember of the Fenner's car struck the surface of the road under construction and scooped up gravel." 657 F.2d at 651. Yet "Mr. Fenner's testimony was that he

drove very carefully over the road, braking for potholes and bumps." *Id.* The jury would have to further

> infer that a stone was carried from the time the Fenners entered the turnpike then dropped into position to cause stone interference without a noticeable change in the steering after the left turn; that stone interference occurred while turning the steering wheel to the right; and that the stone interference caused the steering wheel to lock and the Fenner car to veer left into the median and the abutment.

Fenner, 657 F.2d at 651. Thus, the court clearly demonstrated that the "simple" inference of causation, as set forth by petitioners, must necessarily rest upon a series of inferences which are patently unreasonable based on the evidence presented.[2]

The court focused upon Mr. Fenner's own testimony as to how he drove the car. It is Mr. Fenner's testimony that clearly negates any possibility that he "scooped up" a rock on Sample Road (the only means shown by the testimony by which a rock could have reached the crucial area) and which clearly negates "stone interference" as a cause of the "lock up" in view of his course of driving and the various turns he made. If the expert testimony is accepted, of course, Mr. Fenner's testimony rules out "stone interference" as a cause of the "lock up". But disregarding the expert testimony entirely still does not aid petitioner, since it leaves a substantial gap in the evidence, there being no evidence whatsoever that

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2 Cf. Smith v. General Motors Corporation, 227 F.2d 210, 213-16 (5th Cir. 1955) (where the court engaged in a similar dissection of an ultimate casual inference). See also Cora Pub, Inc. v. Continental Gas Co., 619 F.2d 482, 486 (5th Cir. 1980) ("The important question is whether the inference is reasonably well supported by the evidence. We must judge the inference as we would any other, taking into consideration that its probability may be attenuated by each underlying inference.")

a stone could reach the crucial area, given Mr. Fenner's testimony. Likewise, there was no evidence whatsoever that the defect could cause a "lock up", given the turns which Mr. Fenner said he made, even if a stone reached the crucial area. If Mr. Fenner's own testimony is to be accepted, the suggested inference that "stone interference" was the cause of the "lock up" is unsupported at best, and the required underlying inferences are seen to be unreasonable.

The court noted the absense of any substantial evidence opposed to the motion for judgment n.o.v.; "that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions..." *Boeing Co.*, 411 F.2d at 374. The total absence of this evidence is underscored by the fact that the evidence presented at trial (by both parties) clearly demonstrated that the alleged defect did not cause the accident. It is in this context that the Fifth Circuit observed that in order for the jury to conclude that the defect at issue caused the accident, "the jury would have to disregard the evidence of other possible causes." *Fenner*, 657 F.2d at 651. Given this state of affairs, the court appropriately pointed out that the "[p]laintiffs are not entitled to a verdict based on speculation and conjecture." *Fenner*, 657 F.2d at 651.

The court's analysis of the evidence, as well as the reasonable inferences to be drawn from that evidence, led to the inevitable conclusion that the inference of causation relied upon by petitioners was unreasonable and unsupported by substantial evidence. Moreover, on the evidence presented in this case, plaintiffs still failed to meet their burden of proof.

As stated in *Nielsen v. City of Sarasota*, 117 So.2d 731, 733 (Fla. 1960), the fact of proximate causation "may be proved by circumstantial evidence if the inference of the fact preponderates over other

inferences." *See also Mutual Life Ins. Co. v. Hamilton*, 143 F.2d 726, 732 (5th Cir. 1944) (applying Florida law.)[3] Petitioners have simplistically contended that the jury, based solely on the alleged steering lockup, could somehow have "reasonably" inferred that the defect caused the "lockup", despite overwhelming evidence to the contrary. Assuming arguendo that the jury was entitled to make the suggested inference, there are still other inferences of causation supported by the evidence, which are at least as reasonable, if not more so, than the inference suggested by petitioners. For example, the alleged steering lockup could reasonably have been precipitated by tire failure or a loss of power steering fluid (as suggested by Mr. Fenner's own testimony), especially if acting in combination. These elements, either singly or in combination, could have proximately caused Mr. Fenner's accident, just as much as the defect at issue. Thus, plaintiffs did not meet their ultimate burden of proof, as set forth in *Nielsen* and again in *Shepherd v. Finer Foods, Inc.*, 165 So.2d 750, 753 (Fla. 1964), where the court stated that

> Where circumstantial evidence is relied on in a civil case to prove an essential fact or circumstance essential to recovery, the rule is that the particular inference of the existence of the fact relied on as arising from the circumstances established by the evidence adduced, shall outweigh all contrary inferences to such extent as to amount to a preponderance

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3 The burden of proof in diversity cases is determined by the appropriate state law, which in this case is Florida law. See Coastal Plains Feeders, Inc. v. Hartford Fire Ins., 545 F.2d 448, 450-51 n. 5 (5th Cir. 1977); Peterson v. Mountain States Tel. & Tel. Company, 349 F.2d 934, 936 (9th Cir. 1965) (and cases cited therein). See also Olsen v. Shell Oil Co., 595 F.2d 1099, 1104-05 (5th Cir. 1979), cert. den. 444 U.S. 979 (1980).

> of all of the reasonable inferences that might be drawn from the same circumstances.

See also Borrell-Bigby Elect. v. United Nations, Inc., 385 So.2d 713, 715 (Fla. 2d DCA 1980) ("Since [the plaintiff] relied on circumstantial evidence to prove proximate cause, it had to establish that the allegedly faulty design of the fire alarm system was the most probable cause of its losses.")

When contrasted with other inferences of causation, the particular inference of causation advocated by petitioners is not even of equal weight. Thus, the jury would had to have accepted this inference of causation by disregarding evidence which served as a predicate for other inferences of causation which were of at least equal weight and validity. In this situation, the suggested inference did not "outweigh all contrary inferences to such extent as to amount to a preponderance of all of the reasonable inferences that might be drawn from the same circumstances." *Shepherd*, 165 So.2d at 753. Given this circumstance, the jury's verdict is not supported by legally sufficient evidence. *See General Motors Corporation v. Wolverine Ins. Co.*, 255 F.2d 8, 9 (6th Cir. 1958); *Smith v. General Motors Corporation*, 227 F.2d at 216; *Lovas v. General Motors Corporation*, 212 F.2d 805, 808 (6th Cir. 1954) (each case holding that when alternative inferences are of equal force or weight, the plaintiff has failed to meet his burden of proof). *See also General Motors Corporation v. Muncy*, 367 F.2d 493, 498 (5th Cir. 1966); *McNamara v. American Motors Corporation*, 247 F.2d 445, 448 (5th Cir. 1957).

Having set forth the context for this case, as well as discussing the basis for the Fifth Circuit's opinion, we now respond to the petitioners' arguments for granting the Petition for a Writ of Certiorari.

B. THERE IS NO REASON FOR ISSUING A WRIT OF CERTIORARI BASED ON THE ARGUMENTS ADVANCED BY PETITIONERS.

1) The Court below did not pass upon the credibility of the witnesses.

Petitioners have argued that the Fifth Circuit passed on the credibility of the witnesses during its analysis of the evidence. But petitioners do not point to any language in the court's opinion whereby the credibility of witnesses was discussed — perhaps because no such language exists. Instead, they discern some problem with the court's observation that in order to conclude that the defect at issue caused the accident, "the jury would have to disregard the evidence of other possible causes." *Fenner*, 657 F.2d at 651. However, as explained above, this language simply alludes to the fact that within the total evidentiary context of the trial, the jury could not possibly have inferred, in any reasonable manner, that the defect caused the purported lockup, unless it disregarded the evidence presented.[4]

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4 The petitioners, at page 9, note 9 of their Petition, have sought to gloss over the evidenciary weaknesses of their position by citing **Lowe v. General Motors Corp.**, 624 F.2d 1373 (5th Cir. 1980). They contend that the accident there occurred in the same manner as the accident in the present case, when in fact, the accident in **Lowe** must have occurred during a left turn. The drive in **Lowe** "overtook and passed the automobile [of another person]. To do so, [the driver] went into the left lane and then, after she had overtaken the car, back into the right lane, straightening her course...suddenly [her] automobile inexplicably angled to the left again..." **Id.** at 1376 (e.s.). In order for the driver to straighten her course after turning right to move into the right lane, the driver would have to have turned left.

While we recognize that the court in **Lowe** was not concerned with the same issue or evidence as was present in this case, we discuss **Lowe**

The Fifth Circuit's analysis is by no means one based on the credibility of witnesses. The important question is whether the jury's inference of causation "is reasonably well supported by the evidence." *Cora Pub, Inc.*, 619 F.2d at 486. Such was not the case here, based on all of the evidence presented. Apparently, petitioners' disagreement with this conclusion has given rise to their contention that the court passed on the credibility of the witnesses, when in fact the court was merely utilizing well-settled law and passing on the sufficiency of the evidence.

2) The decision below does not conflict with other Courts of Appeals concerning accepted methods of proving a prima facie case in a products liability action.

Petitioners have argued that the opinion issued by the Fifth Circuit is in conflict with other Courts of Appeals which have concluded "that a *prima facie* case...is proven by direct evidence that the product malfunctioned in a manner which caused the plaintiff's injuries, and/or by direct evidence sufficient to satisfy the jury that the plaintiff's injuries were not caused by something other than a defect in the product." (Petition at 17). However, the cases cited by the petitioners to support this argument (and to show

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only because the petitioners have done so. Parenthetically, we also mention that contrary to petitioners' assertion (Petition at 9), there was no expert testimony which, taken in context, would support the alleged possibility that the defect could have caused the accident, given Mr. Fenner's testimony. In fact, petitioners' expert witness stated that on the facts of this case, as gleaned from Mr. Fenner's uncontradicted testimony, stone interference was not the cause of the alleged lockup. (T-II-183-92).

"conflict") are readily distinguishable.[5]

5 The Petition (at 17, note 15) presents this Court with a string cite of some 14 decisions which supposedly conflict with the Fifth Circuit's opinion. Unfortunately, the petitioners have not attempted to demonstrate or explain this conflict - perhaps because no such conflict exists. Each of the cases, when examined for relevance vis-a-vis the issue at bar, simply represents the application of settled principles of law to the facts before a particular court. Thus, in **Langford v. Chrysler Motors Corp.**, 513 F.2d 1121, 1124-25 (2d Cir. 1975) and **Chesnut v. Ford Motor Co.**, 445 F.2d 967, 971 (4th Cir. 1971), the courts were primarily concerned with the sufficiency of circumstantial evidence to show the existence of a defect. In **Sochanski v. Sears, Roebuck and Co.**, 621 F.2d 67, 69-70 (3d Cir. 1980), **Longnecker v. General Motors Corp.**, 594 F.2d 1283, 1285-87 (9th Cir. 1979), **Fernandez v. Chios Shipping Co., Ltd.**, 542 F.2d 145, 154-55 (2d Cir. 1976) and **Greco v. Bucciconi Engineering Co.**, 407 F.2d 87, 90-91 (3d Cir. 1969), the courts were primarily occupied with the same concern. Also, they mentioned the existence of ample evidence to support an inference of causation between a defect and an accident in the factual situations presented in those particular cases.

In **Lindsay v. McDonnell Douglas Aircraft Corp.**, 460 F.2d 631, 638-40 (8th Cir. 1972), the court engaged in a general discussion of circumstantial evidence. Likewise, in **Farner v. Paccar, Inc.**, 562 F.2d 518, 525 (8th Cir. 1977); **Riha v. Jasper Blackburn Corp.**, 516 F.2d 840, 842 (8th Cir. 1975); **Summers v. Interstate Tractor & Equip. Co.**, 466 F.2d 42, 46-47 (9th Cir. 1972); and **Kridler v. Ford Motor Co.**, 422 F.2d 1182, 1184 (3d Cir. 1970), the courts engaged in similar discussions, with an eye to the existence of sufficient circumstantial evidence to support inferences of causation. Each court noted the need for at least a "preponderance" of the evidence, or evidence from which the jury could have "rationally" reached its conclusion, or evidence which provided a "reasonable probability" for drawing a given inference. As for **Hall v. General Motors Corp.**, 647 F.2d 175, 178 (D.C. Cir. 1980) and **Stewart v. Ford Motor Co.**, 553 F.2d 130, 137 (D.C. Cir. 1977), the courts there stated that if a plaintiff presents circumstantial evidence of causation, that evidence should tend to negate causes for an accident other than a defect in the product. These cases represent the D.C. Circuit's interpretation of District of Columbia law. See **Fenner**, 657 F.2d at 652 n.2 (Kravtich, J., dissenting) and **Hall**, 647 F.2d at 178. In contrast, under Florida law, the plaintiff, when presenting circumstantial evidence of causation, must meet the burden of outweighing other inferences of causation.

Finally, the petitioners cite **Leathers v. General Motors Corp.**, 547 F.2d 1083 (4th Cir. 1976), a case involving the "stone interference" phenomenon in which it was held that, although the evidence of causation was "thin", there was enough to go to the jury. It should be

Additionally, petitioner's argument overlooks or misconstrues the nature of the evidence presented in this case. There was no direct evidence as to causation. The element of causation must necessarily have been inferred, and in this instance, there was no basis on which to reasonably infer that the defect was, by a preponderance of the evidence presented at trial, the proximate cause of the accident.

3) The decision below does not conflict with decisions of this Court and other Courts of Appeal concerning the conclusiveness of expert testimony.

Petitioners have argued that the Fifth Circuit has departed from the well-settled proposition that the jury is not bound by the uncontradicted testimony of expert witnesses. But at no point in its opinion did the court state or even imply that the jury in this case was bound by the expert testimony. Instead, the Fifth Circuit focused on the principle that "[t]here must be a

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noted, however, that in that case, unlike this one, the driver swerved sharply to the left - exactly the condition in which all three experts in this case testified the "stone interference" phenomenon could occur. And, so far as the opinion in **Leathers** discloses, no other explanation for the steering lockup in that case was offered. Even without any alternative explanation for the steering lockup, and with documentary evidence demonstrating that "stone interference" could have created the lockup in that situation, the District Court in **Leathers** characterized the evidence on causation as "thin". The Fourth Circuit expressly agreed with that appraisal, and held only that the trial court had not abused its discretion in submitting the issue to the jury.

In marked contrast to **Leathers**, the instant case presents several alternative causal possibilities, as well as a situation in which the alleged loss of steering ability occurred in a context in which all of the evidence suggests that no stone could ever have been propelled into the crucial area and which in any event, a stone lockup could not have occurred. If, as the court in **Leathers** stated, evidence of causation there was "thin", here it is totally absent.

conflict in substantial evidence to create a jury question." *Fenner*, 657 F.2d at 648, quoting *Boeing Co.*, 411 F.2d at 375. Here, the court properly observed that "[a]lthough various possibilities were suggested as to the cause of the accident, there is no conflict among the experts as to what was not its cause *based on Mr. Fenner's facts.*" *Fenner*, 657 F.2d at 650 (e.s.). The court proceeded to point out that those facts "were uncontradicted [and] unimpeached," *id.* at 651, and that when viewed in light of the evidence presented at trial by both parties, those facts would simply not support a reasonable inference that the defect proximately caused the accident.

Petitioners have misinterpreted the *Fenner* decision as mandating the acceptance of expert testimony. As explained above, the court did not so hold.[6] What the court did do was implicity recognize that "while the jury is the final arbiter of any factual controversy, a jury must base its verdict upon the evidence adduced at trial." *Parker v. Wideman*, 380 F.2d 433, 436 (5th Cir. 1967). Such was not the case here, the jury's verdict having been impermissibly based on speculation and conjecture.

We also note that petitioners have cited to and alleged conflict with *Fortunato v. Ford Motor Co.*, 464 F.2d 962 (2d Cir. 1972), cert. den. 409 U.S. 1038 (1972), where the court rejected the proposed application of the "physical facts rule"; i.e., that testimony as to a given event, described in a certain manner, is contrary to proven physical facts and hence should be disregarded. *Id.* at 965-66. Petitioners have

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6 As discussed above, the Fifth Circuit simply held that accepting Mr. Fenner's testimony as to how he drove and disregarding the expert testimony, there was no evidence of a causal link between the defect and the lockup. In contrast, the evidence did suggest alternative causal possibilities which could not be disregarded because petitioners' suggested inference did not preponderate over them.

again misconstrued the thrust of the Fifth Circuit's opinion, in which the court neither alluded to nor discussed the "physical facts rule." Rather, the court was concerned with the insufficiency of the evidence (presented by both parties) as to the issue of causation, whereas, in *Fortunato*, the defendant acknowledged "that [while] there was more than sufficient evidence introduced by the plaintiff to support a verdict on his behalf..." that evidence should have been disregarded as being contrary to proven physical facts. 464 F.2d at 965. In the present case, the Fifth Circuit did not disregard or ignore any of the evidence, but examined all of it in the light most favorable to petitioners, with the conclusion that "the evidence...was so overwhelmingly in favor of the defendant that reasonable men could not arrive at a contrary verdict..." *Fenner*, 657 F.2d at 651.

4) The decision below does not conflict with other decisions of the Fifth Circuit.

Petitioners urge that the Fifth Circuit's decision in the present case conflicts with prior decisions issued by the same court. One premise for this argument is that the Fifth Circuit's opinion in *Fenner* holds that jurors are bound by uncontradicted expert testimony. As discussed above, the court never enunciated (or intimated) such a holding. The other premise for petitioners' argument is that other Fifth Circuit cases have held that "a plaintiff in a products liability action presents a *prima facie* case...when he proves by direct evidence that the product malfunctioned in a manner which caused the plaintiff's injuries, and/or when he offers direct evidence sufficient to satisfy the jury that the plaintiff's injuries were not caused by something other than a defect in the product." (Petition at 21).

The opinions cited by the petitioners to support this argument (and to show "conflict") are readily distinguishable.[7]

Petitioners candidly concede that their alleged intra-circuit "conflict" is not a sufficient reason for invoking this court's discretionary jurisdiction. But having made this concession, they nonetheless attempt to argue that the alleged "conflict" is more in the nature of an intra-circuit conflict between the Fifth Circuit and the newly formed Eleventh Circuit. This is nothing more than sheer speculation.[8] The Eleventh

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7 The Petition (at 21, note 17) cites four prior Fifth Circuit decisions which supposedly conflict with the Fifth Circuit's opinion in **Fenner**. However, each decision, when examined for relevance in light of the issues at bar, is inapplicable. In **Franks v. National Dairy Products Corp.**, 414 F.2d 682, 687 (5th Cir. 1969), the court, after reviewing the evidence, noted that "the trial judge concluded that a defect...was the cause of the [explosion] because such a defect is the only thing that could have caused the explosion. In short, the existence of a defect was the only reasonable inference that was left." (e.s.) To roughly the same effect is **Remington Arms Co., Inc. v. Wilkins**, 386 F.2d 48, 55 (5th Cir. 1967), where the court observed that "viewing the evidence as a whole the [gun] cartridge irrefutably had to be defective or it would not have fired in the abnormal manner sworn to by the plaintiff." (e.s.) In the present case, the plaintiff's inference of causation was not the only reasonable inference permitted by the evidence (indeed, it was an unreasonable inference in the first place). Furthermore, plaintiffs' theory of causation was hardly irrefutable.

In both **Vandercook and Son, Inc. v. Thorpe**, 395 F.2d 104, 106-07 (5th Cir. 1968), and **Ford Motor Co. v. Mathis**, 322 F.2d 267,270-72 (5th Cir. 1963), the court pointed to the existence of sufficient evidence to present a jury question as to the existence of a defect and its causal link with the accidents in question. Obviously, the preceding cases are all distinguishable on the basis of different fact situations. Moreover, to the limited extent that these four cases may be rather expansively read to support petitioners' generalization of what constitutes a prima facie products liability case, they are still of no consequence vis-a-vis **Fenner**. In the case at bar, the Fifth Circuit was concerned with the sufficiency of all the evidence to reasonably support the inference of causation advocated by the plaintiffs.

8 Apparently, in "support" of this speculation, the petitioners find some measure of comfort in **Croce v. Bromley Corp.** 623 F.2d 1084 (5th

Circuit has not addressed a similar situation as the one at bar, and should it do so at some future time, the Fifth Circuit's opinion in *Fenner* will be treated as if it had been decided by the Eleventh Circuit, so that the opportunity for even this speculative "conflict" should be non-existent. *See Bonner v. City of Pritchard, Ala.* 661 F.2d 1206, 1207 (11th Cir. 1981).

5) The Court below did not reach an impermissible result under Florida law.

Petitioners argue that, had this cause been fully tried in state court, the outcome would have been different. This argument is not only speculative, but also completely devoid of merit. While proximate causation may be proved inferentially by circumstantial evidence, two elements must be present under Florida law. First, the suggested inference must be reasonable; and second, the inference must "outweigh all contrary inferences to such extent as to amount to a preponderence of all of the reasonable inferences that might be drawn from the same circumstances." *Shepherd*, 165 So.2d at 753. *See also Nielsen*, 117 So.2d at 733. As discussed at length above, both of these elements are absent in this case.

Petitioners have sought to minimize the inherent weakness of their position by relying upon *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981), where the court was concerned with the burden of proof as to establishing the existence of a defective

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Cir. 1980). But petitioners' discussion of Croce is nothing more than an extension of their wholly unwarranted speculation. In any event, Croce presents an entirely different factual situation than the case at bar - and no conflict whatsoever as far as principles of law (or their application) are concerned.

condition.[9] Of course, the existence of such a condition was not the issue before the Fifth Circuit. Rather, the issue in *Fenner* was proof of proximate cause:

> [t]he district court found, and it is not challenged on appeal, that the Fenner's car was manufactured with an inherent steering defect and that General Motors had knowledge of the defect. The court also found, however, that the evidence was not sufficient to create a jury question that the defect was the proximate cause of the accident.
>
> Proof of the defect alone is insufficient. There must also be evidence that the defect caused the accident.

657 F.2d 649-50.

The petitioners have quoted *Cassisi* out of context to arrive at the incredible conclusion that "*Cassisi* holds unequivocally that Mr. Fenner's testimony that his steering system locked created a legal presumption that a defect in his automobile caused the accident..." (Petition at 26). *Cassisi* held no such thing. What the court there did hold, with respect to establishing that a defect existed, was that there is one

> type of proof of product defect, which, from a given set of circumstances, aids a plaintiff in meeting his burden by creating a legal inference

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9 The existence of a defective condition, as opposed to whether such a condition caused the injuries complained of, was also the central concern in **McCarthy v. Florida Ladder Co.**, 295 So.2d 707, 709-10 (Fla. 2d DCA 1974); **Armor Elevator Co. v. Wood**, 312 So.2d 514, 515 (Fla. 3d DCA 1975), cert. den. 330 So.2d 14 (Fla. 1976); **Ford Motor Co. v. Pittman**, 227 So.2d 246, 250-51 (Fla. 1st DCA 1969), cert. den. 237 So.2d 177 (Fla. 1970); and **Ford Motor Co. v. Cochran**, 205 So.2d 551, 553 (Fla. 2d DCA 1967), cert. den. 211 So.2d 212 (Fla. 1968). All of these cases are cited by the petitioners at page 25, note 20 of the Petition. Their relevance, however, is unexplained.

> that the product was defective both at the time of the injury and at the time it was within the control of the supplier. This inference arises from the occurrence of the accident itself, and the case most often cited as so holding is *Greco v. Bucciconi Engineering Co.*, 283 F.Supp. 978 (W.D.Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969).

396 So.2d at 1148. (e.s.) While a plaintiff may, in accordance with *Cassisi*, establish a prima facie case as to the existence of a defect, the plaintiff is still required to prove, by a preponderance of the evidence, that the defect "caused the injuries complained of..." *Id.* at 1143. As explained earlier, if a plaintiff attempts to establish this element of causation by circumstantial evidence, he must meet certain burdens of proof set forth by the Florida Supreme Court. In this case, those burdens of proof were simply not met with sufficient evidence to support the jury's verdict. [10]

CONCLUSION

This case simply does not warrant review by this

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10 On this basis, **C.R. Bard, Inc. v. Mason**, 247 So.2d 471 (Fla. 2d DCA 1971), cert. den. 251 So.2d 878 (Fla. 1971) (which was cited and relied upon by petitioners), actually supports respondent's position. In **Mason**, the court stated that

> Of course a finding that the catheter was severed as a consequence of faulty manufacture is based on an inference. There is no direct proof of this fact. But all of the other possibilities are excluded by direct evidence which the jury could - and obviously did - believe. This leaves the inference of faulty manufacture sufficiently supported.

247 So.2d at 471-72 (e.s.). In sharp contract to **Mason**, the plaintiffs here did not exclude by direct evidence all other possibilities of causation, thereby outweighing other inferences of causation. Rather, they relied upon an inference which was neither reasonable nor sufficient to outweigh other inferences.

Court. The issue involved is not one of unusual or special significance. Moreover, the Fifth Circuit arrived at a conclusion which is completely proper, and it did so in a manner which is in harmony with the applicable law. For the reasons discussed above, the respondent requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Joel D. Eaton, Esquire, Podhurst, Orseck & Parks, P.A., 25 West Flagler Street, Miami, Florida 33130; Brent M. Turbow, Esquire, 930 Atlantic Bank Building, Jacksonville, Florida 32202; and Arthur T. Boone, Esquire, 404 Florida Theatre Building, Jacksonville, Florida 32202, Attorneys for Petitioners, by U.S. Mail this _____ day of January, 1982.

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Attorney